COLLAPSING TORTS

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I. INTRODUCTION: THE CONCEPT OF COLLAPSE

To compress, to shape, to label the erratic sequences of life is the perennial function of the judges.[1]

THE observation that judges manipulate doctrinal elements to achieve allocational effects is hardly revolutionary. Neither is it a solely contemporary phenomenon. The casuistic development of tort law has been sustained by many reasoning techniques; general rules have developed exceptions which in turn have metamorphosed into new general rules,[2] analogies have been accepted[3] or rejected,[4] and doctrinal elements have been de-emphasized[5] only to be reemphasized once again.[6]

Doctrinal collapse is part of the lexicon of juridical development.[7] However, its prevalence in modern and post-modern tort law has been

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1. MORROW'S INTERNATIONAL DICTIONARY OF CONTEMPORARY QUOTATIONS 311 (Jonathan Green ed., 1982) (attributed to a 1965 Esquire Magazine article by Sybille Bedford).

2. *See infra* text accompanying notes 99-104.

3. *See, e.g.*, Becker v. IRM Corp., 698 P.2d 116 (Cal. 1985) (landlord-tenant relationship analogized to manufacturer-consumer relationship, leading to application of strict liability).

4. *See, e.g.*, Hammontree v. Jenner, 20 Cal. App. 3d 528 (1971) (refusing to analogize automobile driving to product manufacture and thus precluding application of strict liability).

5. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (issues such as sensory and contemporaneous observance were *factors* to be taken into account in determining foreseeability).

6. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814 (Cal. 1989) (issues such as sensory and contemporaneous observance were doctrinal *requirements*).

7. *See, e.g.*, Susan H. Williams, *Content Discrimination and The First Amendment*, 139 U PA. L. REV. 615 (1991). *See also* Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990); Robinson v. Caulkins Indiantown Citrus Co., 771 F. Supp. 1205, 1214 (S.D. Fla. 1991); Moro-Romero v. Prudential-Bache Sec., Inc., No. 89-1821, 1991 U.S. Dist. LEXIS 20169, at *9 (S.D. Fla. Aug. 23, 1991); United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1098 (D. Del. 1988), *aff'd*, 879 F.2d 857 (3d Cir. 1989).

underestimated.[8] Equally unappreciated is that there are different species of collapse. The variations involve discrete judicial motives and produce radically different results.

This Article examines collapse as a judicial phenomenon, arguing that cyclical collapsing and uncollapsing of tort doctrines are standard techniques used by judges as they continually adjust the degree of loss reallocation and deterrence. To make this argument requires critical analysis of the doctrinal and meta-doctrinal structures (and labels) of modern accident law. To substantiate it necessitates exploring certain causes of action and doctrinal rules that exhibit confusion or compression, either between allocation models and operational rules or between different levels of operational rules. Examples of such confusion and compression attract the label "collapse."

Part II of this Article introduces the allocation model/operational rules dichotomy upon which the later collapse analysis is premised. Part III begins the detailed discussion of the collapse concept. Part IV identifies causes of action in various stages of collapse. Finally, Part V concludes by suggesting decision-maker value preferences that promote collapse.

II. ALLOCATION MODELS AND OPERATIONAL RULES

A. *Allocation Models*

Per conventional wisdom, accident law references three broad allocation models for fact patterns exhibiting socially desirable conduct:[9]

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8. *Cf.* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse In Products Liability: The Empty Shell Of Failure To Warn*, 65 N.Y.U. L. REV. 265, 289-311 (1990) (arguing for less ambiguous standards in failure to warn cases); Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 356-57 (1991) (discussing how legal form evolves through common law process).

9. This discussion is limited to the allocation models and operational rules courts traditionally apply to otherwise socially desirable activities that result in personal injury or property damage. Different meta-doctrinal rationales and doctrinal structures apply to conduct that generally is held to be socially undesirable, principally intentional or deliberate conduct. Of course, it does not follow that there cannot be overlap at the allocational level, and hence duplication at the operational level. For example, Ghassemieh v. Schafer, 447 A.2d 84 (Md. App. 1982), was a "chair pulled out from behind the plaintiff" case. The legal subconscious immediately cross-indexes Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955) (a case of battery when five-year-old pulled chair out from under arthritic plaintiff, whom he knew was in the process of sitting). But *Ghassemieh* was brought in negligence, not battery. Notwithstanding, the court held that in principle the fact pattern could involve liability for either negligence or battery. *Ghassemieh*, 447 A.2d at 90. Outside of such simple battery cases, the instinctive "a punch in the nose must be a battery" approach begins to run out of steam. As a result, the courts have been firmer on battery-negligence territorial disputes. *See, e.g.*, Trogun v. Fruchtman, 207 N.W.2d 297, 312-13 (Wis. 1973) (listing the

negligence, strict liability, and absolute liability.[10] The placement of any fact pattern within a particular allocation model has been essentially heuristic, involving rule-of-thumb labeling of fact patterns in a process informed by historical, conceptual, and even anecdotal or accidental rationales.

Instead of resigning itself to the empirical nature of the process, much of the literature discussing the "appropriate" allocation models for types of activities has been overtaken by a politicized debate seeking to establish definitively the *original*,[11] and, therefore, the (internally assumed) *correct* allocation model.[12] This pseudo-historical search for the original allocation model has its roots in economic analysis. What is, by now, trite economic analysis suggests that if we lived in a perfect world without transaction costs, where potential injurers and victims possessed "perfect information," then the market would guar-

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structural reasons why informed consent cases should be brought in negligence not battery).

As a rule, the fact patterns associated with the premodern intentional torts—assault, battery, false imprisonment, trespass to realty, trespass to personalty, and conversion—are self-limiting. Because of various historical, social, behavioral, and governmental reasons, the amount of antisocial conduct that actually exists is relatively finite; a culturization that reduces the level of judicial concern regarding limits on the numerical incidence of intentional tort exposure. Furthermore, at a political level, redistributive decisions are considerably more difficult to justify when they flow from socially desirable conduct. *See generally* Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 786-91 (1990); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (discusses shift to fault theory of liability); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989) (outlines morality latent in the structure of torts); Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

10. These labels only have relative importance, that is, they reflect judicial groupings of fact patterns with an increasingly greater level of risk redistribution.

11. This is so notwithstanding the fact that the most important contemporary model—negligence—failed to have any discrete visibility until almost the end of the nineteenth century. *See generally* G.E. WHITE, TORT LAW IN AMERICA 16-19 (1980).

12. *See, e.g.*, Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990) (rejecting theory that economic efficiency was the dominating force behind nineteenth-century judicial instrumentalism); David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529 (1985) (critiquing enterprise liability); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (describing development and acceptance of enterprise liability); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) (rejecting subsidy thesis). *See also* M.J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 85-108 (1977); F.J. VANDALL, STRICT LIABILITY 1-10 (1989); William Cohen, *Fault and the Automobile Accident: The Lost Issue in California*, 12 UCLA L. REV. 164, 165-79 (1964) (discussing no-fault liability); Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129 (1990) (arguing for an economic justification for an enterprise liability regime that does not recognize the defense of contributory negligence).

antee the most efficient reduction of accidents and their costs.[13] This reduction, it is said, would occur regardless of whether tort law allocated accident responsibility to defendants (by generally holding them liable for a particular activity's accident costs)[14] or to plaintiffs (by generally *not* holding defendants liable).[15]

Because of transaction costs and other market imperfections, however, such a world does not exist.[16] As a result, it *does* seem to matter where the initial accident avoidance responsibility (liability) rule is placed; and tort actors apparently will take their risk-management and insurance cues from this premise. Thus, the search for an allocational ground zero has distilled to a concentration of scholarship on whether tort liability, *historically*, was fault based or strict liability based.[17]

What matters for the collapse analysis is not why initial placements of fact patterns in particular allocation models have been made.[18] Rather, the premises that underlie the following analysis are first, that fact patterns are distributed within relatively gross allocation models, and second, that fact patterns are not static, they can be moved both within and between allocation models.[19]

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13. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

14. In which case more initial accident reduction costs would be allocated to defendants.

15. In Calabresian terms, primary accident avoidance responsibility would fall on plaintiffs. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

16. *See generally* Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (discussing flaws in Coase Theorem).

17. *Cf.* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (critiquing the "historical search" approach). *See generally* Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231 (1990) (developing a penalty-based descriptive model of tort doctrine); Wex S. Malon, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970) (discussing the role of fault in early law); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter Prosser, *Fall of the Citadel*] (exploring abandonment of privity of contract); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *Assault upon the Citadel*] (discussing the requirement of privity of contract).

18. Otherwise, much more attention would be paid to Calabresi's statement that the correct approach is to ask: "Who is best suited to make the cost-benefit analysis between accident costs and accident avoidance costs? In other words, it would ask who should bear the incentive *to decide correctly*, rather than what is the correct decision." Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 666 (1975). *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (discussing shift to fault theory of liability).

19. The explicit focus of this Article is not meta-doctrinal, let alone instrumentalist; rather, the Article concentrates on judicial techniques for executing such choices, whether or not the underlying reasoning is valid. *See supra* text accompanying notes 14-15.

B. *Operational Rules*

Operational rules are less controversial than allocation models. Assume that a court assigns a particular fact pattern to a particular allocation model, for instance, by categorizing dentistry within strict liability.[20] That assignment would be meaningless without some operational structure to handle individual occurrences of the fact pattern ("cases"). Thus, the court also must provide operational rules ("doctrine") to give effect to the chosen allocation model.

By definition the operational rules must be faithful to the allocation model. That is, in the aggregate, the application of the previously announced operational rules should achieve a quantitative risk redistribution consistent with the allocation model.[21] In the dentistry example, the effect of the assumed strict liability operational rules *should* be to redistribute a large number—more than negligence, fewer than absolute liability—of dentistry-related risks.[22]

In fact, the responsibilities of appellate judges go further than declaring grand allocative designs. For their structures to prosper, the declarative courts must closely define the fact pattern they intend to allocate,[23] provide information as to the precise risk-redistribution sought,

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20. *Cf.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969).

21. For purposes of this Article, a negligence allocation model will depend upon fault-oriented operational rules, whereas an absolute liability model relies upon a simple causation rule. A strict liability model typically displays operational rules which are not dependent upon personal fault, yet require a showing of more than causation. *See, e.g.*, Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1211 (Alaska 1978).

Unlike absolute liability, strict liability rules may include affirmative defenses premised on plaintiff misconduct. *See* Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 TUL. L. REV. 1303, 1329-34 (1988) (reduction of defenses available to defendant).

22. *See generally* Nicolas P. Terry, *State of the Art Evidence: From Logical Construct to Judicial Retrenchment*, 20 ANGLO-AM. L. REV. 285, 285-90 (1991) (discussion of allocation models and operational rules).

23. *See, e.g.*, Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972), *cert. denied*, 441 U.S. 983 (1973), in which the court applied the strict liability rule in the Second Restatement to an accident involving a gasoline truck. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1964). The majority opinion apparently identified the fact pattern as "[t]ransporting gasoline as freight by truck along the public highways and streets," 502 P.2d at 1187, which provoked a strongly worded concurrence from Justice Rosellini, who more tightly defined the fact pattern as follows:

> I think the opinion should make clear . . . that the owner of the vehicle will be held strictly liable only for damages caused when the flammable or explosive substance is allowed to escape without the apparent intervention of any outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it. I do not think the majority means to suggest that if another vehicle, negligently driven, collided with the truck in question, the truck owner would be held liable for the damage. But

and provide operational rules for individual decision making. Needless to say, these tasks are unlikely to be achieved, or even attempted, at the same time or even by the same court.[24] Over time, a hierarchy of operational rules should develop which, while unlikely to be reminiscent of some splendidly precise Kelsenian structure,[25] nevertheless will contain rough groupings of tort elements (first-order operational rules), burdens of proof, and procedural and evidentiary rules.[26]

C. *Structural Imperfections*

Whatever the theoretical obligations of our judicial decision makers, reality tends to intrude. The most common breakdowns in the allocation model/operational rule schema occur when a fact pattern is assigned to an allocation model and the assignor either fails to provide any operational rules or provides inapposite rules.

1. Missing or Ignored Operational Rules

The mere allocation of a fact pattern to an allocation model does not determine the outcome of an individual case. For example, the assignment of a fact pattern to the "strict liability" allocation model does not guarantee a plaintiff victory,[27] only that *more* plaintiffs will win as compared to the situation categorized under negligence.

The failure to appreciate this distinction is illustrated in the well

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where, as here, there was no outside force which caused the trailer to become detached from the truck, the rule of strict liability should apply.

502 P.2d at 1188 (Rosellini, J., concurring). *See also* Hoven v. Kelble, 256 N.W.2d 379 (Wis. 1977) (plaintiff's suggested fact-pattern shift to strict liability apparently gains judicial approval, but plaintiff fails to bring himself within fact pattern).

24. *See infra* text accompanying notes 46-64.

25. *See generally* HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 2d ed. 1967).

26. With no great precision, these are referred to as first-, second-, and third-order rules, respectively. For these purposes, precise agreement as to what are the first order operational rules is unnecessary. As an example of first-order rules consider § 281 of the Second Restatement, which states:

> The actor is liable for an invasion of an interest of another, if:
> (a) the interest invaded is protected against unintentional invasion, and
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
> (c) the actor's conduct is a legal cause of the invasion, and
> (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

RESTATEMENT (SECOND) OF TORTS § 281 (1965).

27. At least as strict liability is referred to herein. *See infra* notes 44-46 and accompanying text.

known case of *Anderson v. Somberg*,[28] which concerned injuries suffered by the plaintiff's decedent when the tip of a surgical instrument broke off and lodged in his spine during a back operation.[29] Plaintiff alleged negligence against the surgeon and hospital and strict product liability against the manufacturer and distributor of the instrument.[30] The evidence suggested that the instrument showed no signs of either a structural defect or faulty workmanship.[31] When the defendants' verdict was reviewed by the Supreme Court of New Jersey, the court stated that "the jury should have been instructed that the failure of any defendant to prove his nonculpability would trigger liability; and further, that since at least one of the defendants could not sustain his burden of proof, at least one would be liable."[32]

In reversing the traditional burden of proof, the court undertook a course parallel to various lines of defendant-identification operational rules. These second-order operational rules bear discrete doctrinal shapes such as res ipsa loquitur,[33] alternative liability,[34] or market share liability.[35] As recognized in *Anderson*, in adopting such a rule a court is making an allocational decision that, in this type of fact pattern,[36] tends to increase the number of occasions of plaintiff victory.[37]

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28. 338 A.2d 1 (N.J.), *cert. denied*, 423 U.S. 929 (1975).

29. *Id.* at 3.

30. *Id.*

31. *Id.* at 3-4.

32. *Id.* at 4.

33. *E.g.*, Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944). In *Ybarra*, plaintiff alleged that the negligence of operating physicians and nurses caused a paralyzing arm injury during the course of appendectomy. *Id.* at 688. A res ipsa charge was held proper despite plaintiff's inability, due to anesthesia, to specify what instrumentality, under exclusive control of which defendant, caused the injury. *Id.* at 689-90.

34. *E.g.*, Summers v. Tice, 199 P.2d 1 (Cal. 1948). In this case, the two defendants were hunting and shot at the same time in plaintiff's direction, with one or the other striking him in the eye. *Id.* at 2. The court held that each could be held jointly and severally liable absent proof that he did not fire the shot which struck the plaintiff. *Id.* at 5.

35. *E.g.*, Sindell v. Abbott Labs, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980). In *Sindell*, plaintiff's mother took DES while pregnant, ultimately causing injury to plaintiff. *Id.* at 925. Unable to ascertain the DES manufacturer, she brought suit against several drug companies. *Id.* The court held that all those composing a "substantial percentage" of the drug market could each be liable for an amount proportionate to its market share, absent proof that it could not have produced the DES consumed by plaintiff's mother. *Id.* at 937.

36. In general terms, the fact pattern is conceptualized as involving a blameless plaintiff who encounters high information costs regarding the cause of the accident/injury, multiple defendants with low information costs, and the certainty (or high probability) that the defendant is before the court.

37. The *Anderson* court held that:

> where an unconscious or helpless patient suffers an admitted mishap not reasonably fore-

Proponents of the distributional increase might justify it on the basis that the existing burden of proof will lead to an unacceptable number of false negatives.[38] Its opponents usually object on the basis that the possibility of false positives[39] is too high without the guarantee that all possible defendants are before the court.[40]

However, a much more serious attack may be leveled at *Anderson*. This goes to the "instruction to convict" which is implicit in the majority approach.[41] The court not only took the view that one of the defendants caused the injury, but also that the unidentified culpable defendant breached a duty he owed. Even with a shift in the burden of proof, it was theoretically possible for the defendants charged with negligence to exculpate themselves. It follows, therefore, that the court believed the strict liability defendants could not exculpate themselves. In other words, if a strict liability defendant caused an injury, he would be liable.

This is a fundamental misunderstanding of strict liability, and more specifically strict product liability. Strict liability depends upon more than proof of causation; it requires proof of failure to meet an objective standard.[42] Thus, even with a shift in the burden of proof in favor of plaintiffs, it is still theoretically possible for a strict liability defendant to avoid liability.[43] A strict liability allocation model suggests increased numerical occasions of liability, not liability as a matter

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seeable and unrelated to the scope of the surgery (such as cases where foreign objects are left in the body of the patient), those who had custody of the patient, and who owed him a duty of care as to medical treatment, or not to furnish a defective instrument for use in such treatment, can be called to account for their default. They must prove their nonculpability, or else risk liability for the injuries suffered.

338 A.2d at 5.

38. In this context false negatives occur when deserving plaintiffs lose.

39. False positives occur when undeserving plaintiffs win.

40. This is in contrast to the paradigm *Summers v. Tice* scenario. This criticism (that not all the defendants are present) was not taken lightly and was the primary reason why the Supreme Court of California in *Sindell v. Abbott Labs* developed the more fact-sensitive market share approach. The dissent in *Anderson* forcefully defends the latter point. 338 A.2d at 9-10.

41. The court stated, "Since at least one of the defendants could not sustain his burden of proof, at least one would be liable." 338 A.2d at 4.

42. In this type of quality control case, a consumer expectations test is applied. In practice it depends upon identification of a product's factual defect. For a discussion of factual defect, see Nicolas P. Terry, *Stricter Products Liability*, 52 Mo. L. REV. 1, 21-24 (1987).

43. The only other way of looking at *Anderson* is to view the majority's burden shift as being an alteration in the allocation model applied to product liability defendants in "conspiracy of silence" groups, to use the *Ybarra* image. *See* 338 A.2d at 11 n.5 (Mountain, J., dissenting); *Id.* at 7 n.2 (majority's response).

of law.[44] While the occasional opinion might try to make a political point by equating strict liability with imposing the role of insurer on a particular defendant class,[45] the conventional view is that strict liability is a relative model signaling only an increase (compared to negligence) in risk redistribution. However, other than at unlikely theoretical extremes (e.g., *all* occasions of loss will be redistributed), allocation models make little sense without conforming operational rules.

2. Inapposite Operational Rules

Typically, and consistent with a casuistic approach to doctrinal development, inapposite operational rules are most likely to appear following the recognition of a new cause of action or the inter- or intra-model movement of a fact pattern.[46] In all the excitement of doctrinal development, the operational rules are forgotten, or poorly expressed. A classic example is the development of strict product liability in California.[47] That development began in *Escola v. Coca-Cola Bottling Co.*,[48] with a modification to the negligence operational rule.[49] This modification, which affected the burden of proof, was designed to increase the

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44. See, e.g., *Dippel v. Sciano*, a product liability case in which the court observed correctly the consequences of strict liability:

> The term *strict* liability in tort might be misconstrued and, if so, would be a misnomer. Strict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability. From the plaintiffs' point of view the most beneficial aspect of the rule is that it relieves him of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts.

155 N.W.2d 55, 63 (Wis. 1967). *See also* Daly v. General Motors Corp., 575 P.2d 1162, 1166 (Cal. 1978) ("From its inception . . . strict liability has never been, and is not now, *absolute* liability. . . . [U]nder strict liability the manufacturer does not thereby become the insurer of the safety of the product's user.").

45. *See, e.g.*, Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 552-53 (Cal. 1991) ("strict liability . . . was never intended to make the manufacturer or distributor of a product its insurer[]"); Fletcher v. Rylands, 159 Eng. Rep. 737 (Ex. D. 1865) (*per* Baron Martin, "to hold the defendant liable without negligence would be to constitute him an insurer"), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, [1861-73] All E.R. 1 (H.L. 1868).

46. Indeed, the party arguing for the relocation of a fact pattern will fare better if she supplies new operational rules. For example, in Hoven v. Kelble, 256 N.W.2d 379 (Wis. 1977), the plaintiff was almost successful in going counter-trend in malpractice cases by suggesting operational rules (albeit borrowed from product liability) when arguing that certain malpractice cases should be moved to a strict liability allocation model. *See infra* note 114.

47. For a primer on product liability generally, see Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

48. 150 P.2d 436 (Cal. 1944).

49. *Id.* (res ipsa loquitur used to promote shift in the burden of proof).

redistribution of risk in manufacturing defect cases.[50] However, the seminal California case was *Greenman v. Yuba Power Products, Inc.*,[51] which introduced, for all the expected (and now somewhat simplistic sounding) meta-legal reasons, a strict liability allocation model.[52] Yet, *Greenman* failed to provide any operational rules beyond the phrase "proves to have a defect that causes injury,"[53] and a later reference to "defective."[54]

Subsequent to *Greenman*, the defendant in *Cronin v. J.B.E. Olson Corp.*,[55] sought to introduce the Restatement's "unreasonably dangerous" first-order operational rule.[56] This was rejected with one of the first recorded "smacks of negligence" arguments. When used, this argument identifies a proposed operational rule as originating in the negligence model, and labels it inconsistent, or potentially inconsistent,

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50. The ever elusive doctrine of res ipsa loquitur has two roles in products liability. The first, and one that the doctrine fulfills, is to enable certain negligence-based manufacturing defect cases to get to the jury on the basis of circumstantial evidence alone. In this context, res ipsa operates in a manner consistent with its application in conventional negligence law. That is, a court applies the doctrine to fact patterns in which it is considered that the risk of false positives ("undeserved" recovery) with the doctrine invoked is (to the court) significantly less than the risk of false negatives (no recovery for "deserving" plaintiff) with the doctrine not invoked. These "ordinarily would not occur in the absence of negligence" and "exclusive control" prerequisites for a res ipsa instruction (or as more elegantly stated in Widmyer v. Southeast Skyways, Inc., 584 P.2d 1, 13 (Alaska 1978), the "foundation facts") are designed to implement that rationale at both the fact-pattern and fact-sensitive levels, respectively.

It follows that res ipsa is more about identifying the risk-taker than modifying the standard of care (i.e., it is more factual than normative). Notwithstanding, res ipsa does redistribute risks which would otherwise have been false negatives. Therefore, the doctrine does have allocational effects. Indeed, those effects explain the second role that res ipsa has (or rather had) in products liability law.

In the course of the shift to strict liability during the second third of the twentieth century, res ipsa also provided some jurisdictions with an unannounced intermediate allocation model positioned between negligence and strict liability. The model's operational rules (using circumstantial evidence and, in some jurisdictions, a shift in the burden of proof) could be invoked without openly making a break with negligence. Indeed, the intermediate nature of the "negligence plus res ipsa" rule reflected the judicial ambivalence toward the then current basis of liability. *Escola* is a prime example of res ipsa operating in both its roles.

51. 377 P.2d 897 (Cal. 1963).

52. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 900.

53. *Id.*

54. *Id.*

55. 501 P.2d 1153 (Cal. 1972).

56. Section 402A(1) provides: "One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer. . . ." RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (emphasis added).

with the strict liability allocation model.[57] In spite of defense arguments that using the singular and undefined "defective" standard was consistent with an absolute rather than a strict liability allocation model, the Supreme Court of California was unable or unwilling to reformulate its operational rule.[58] The *Cronin* court took this position on the basis that the Restatement position would redistribute too few risks to be consistent with a strict liability model.[59] The reality was that the *Cronin* position itself was untenable, as it redistributed too many product-related risks, veering toward an absolute liability model. The issue finally was resolved in *Barker v. Lull Engineering Co.*[60] The *Barker* court remained committed to a strict liability, rather than a negligence, allocation model.[61] As in *Cronin*, the *Barker* court disagreed with an "unreasonably dangerous" instruction:[62]

> [A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the bene-

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57. *See, e.g., Cronin*, 501 P.2d at 1161-62 ("The result of the limitation, however, has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence.").

58. *Id.* at 1163.

59. *Id.* at 1162. ("A bifurcated standard is of necessity more difficult to prove than a unitary one. But merely proclaiming that the phrase 'defective condition unreasonably dangerous' requires only a single finding would not purge that phrase of its negligence complexion.")

60. 573 P.2d 443, 457-58 (Cal. 1978). Although *Barker* settled the matter for well over a decade, the recent California opinion in Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549 (Cal. 1991), while a warning case (*Barker* concerned a design defect allegation), and although replete with statements that design issues were "not here in issue," *see, e.g., Id.* at 551 n.2, nevertheless can be read as the initiation of a thorough review of California product law.

61. Note the court's "continued adherence to the principle that, in a product liability action, the trier of fact must focus on the *product*, not on the *manufacturer's conduct*, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action." 573 P.2d at 447.

62. *Id.* at 446.

> fits of the challenged design outweigh the risk of danger inherent in such design.[63]

Note how the court commingled two first-order operational rules[64] and how the risk-utility limb of the formulation was fine tuned with a second-order rule, the burden of proof—all to achieve the precise allocation of product-related risks the court favored.

III. How to Collapse a Tort

Clarifying the distinction between, and interaction of, allocation models and operational rules is key to appreciating the idea of collapse. Equally important is the realization that there is more than one type of collapse.

A. *Vertical Collapse*

A vertical collapse occurs when an allocation model and its operational rules are intermingled, or otherwise rendered less than discrete. The operative aspect of the collapse is that the decision as to how many risks associated with the fact pattern should be redistributed (the allocation model) does not receive recognition discrete from that fact pattern's individual, case-specific, decisional (operational) rules.[65]

Take two well known strict liability torts, product liability and ultrahazardous activities.[66] The former is uncollapsed,[67] the latter is vertically collapsed.

Assume that, as in most jurisdictions, the state of Xanadu's supreme court has held that the product liability/personal injury fact

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63. *Id.* at 455-56.

64. Most jurisdictions use *either* consumer expectations *or* risk-utility. *See infra* text accompanying notes 119-29.

65. At first blush the traditional intentional torts, such as assault, battery, and false imprisonment appear to be vertically collapsed, in that the formulaic inquiry into whether defendant intended to cause an offensive or harmful contact, *see* Restatement (Second) of Torts §§ 13, 18 (1965), appears to be determinative of both fact-pattern allocation and case-specific operation. In fact, it seems more likely that the courts, rather than collapsing the inquiry, merely perform their allocational modeling "off-camera," with a hidden, duty-like analysis which applies the intentional torts to broad categories of anti-social behavior that jeopardize our fundamental interests in person and property. Where intentional torts do look more collapsed is in their more modern iterations which have been influenced by negligence doctrinal structures; an obvious example being intentional infliction of emotional harm, *see id.* § 46, where the "extreme and outrageous" rule seems to dominate both the allocation model *and* its operational rules.

66. *See generally* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963, 970-1003 (1981) (developments in strict liability).

67. This observation is limited to the paradigm design defect case.

pattern attracts a strict liability allocation model.[68] After making that broad allocational decision, the Xanadu courts[69] should provide pointers[70] to suggest just how strict its model is, and operational rules that will achieve a numerical risk redistribution consistent with the allocational decision.

If the Xanadu judges perform these functions, they will be prepared when a product liability fact pattern subsequently comes before a Xanadu court. At that time, the parties and decision maker will expend relatively minor administrative costs in determining the general tenor of the case and the operational rules that will govern the case through the various procedural stages and jury instructions.[71]

Contrast the same court dealing with an alleged ultrahazardous activity. Assume that the supreme court of Xanadu has adopted the Restatement position. The Restatement provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[72] At the risk of stating the obvious, this creates a strict liability tort. It is not negligence-based because the defendant's "utmost care" is irrelevant. Neither is it an absolute liability tort; affirmative defenses are permitted,[73] and the plaintiff must prove something other than causation. That "something other" is contained in section 520, which provides for the consideration of certain risk-utility and geographical-location factors.[74]

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68. Of course, modern product liability in most jurisdictions extends beyond this paradigm fact pattern, to include bystanders, other sellers, and other types of injury.

69. Recall the protracted gestation in California at *supra* text accompanying notes 48-64.

70. Some of which may double as operational rules. *See infra* text accompanying notes 91-109.

71. Obviously, additional administrative and transaction costs will be incurred if a party attempts to characterize the actual facts as not coming within the product liability fact pattern, e.g., by arguing that the root transaction was a service and not a sale.

72. RESTATEMENT (SECOND) OF TORTS § 519(1) (1965).

73. *See id.* § 523 ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm."). Similarly, § 524 provides:

> (1) Except as stated in Subsection (2), the contributory negligence of the plaintiff is not a defense to the strict liability of one who carries on an abnormally dangerous activity.
>
> (2) The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.

Id. § 524. *Cf.* Harper v. State Farm Mut. Auto. Ins. Co., 484 So. 2d 737 (La. Ct. App. 1986) (applying comparative fault principles in case of exploding automobile battery).

74. Section 520 of the Restatement provides:

> In determining whether an activity is abnormally dangerous, the following factors are to

Assume that a plaintiff is injured when a rail car transporting natural gas explodes.[75] There are two possible scenarios, depending upon whether the supreme court of Xanadu previously decided that the transportation of natural gas is an "abnormally dangerous activity."[76]

First, consider the scenario where there is no Xanadu precedent. What determines the allocation model to which the gas transportation attaches? If this was a product liability cause of action, complex meta-legal considerations would determine whether the general fact pattern attracted strict liability, followed by a fact-sensitive inquiry into whether this particular fact pattern was included (i.e., a categorization decision followed by a characterization stage). Both of these steps would precede any operational liability determination. However, with the abnormally dangerous tort, the categorization decision (the crucial inquiry as to the allocation model to be followed), is dictated by section 520. Assume that the court applies the six-part risk-utility analysis and determines that this occurrence of gas transportation is so covered. In a product liability case, that allocation model decision would be *followed* by the application of appropriate operational rules. But the ultrahazardous tort has no discrete operational phase. Rather, it collapses its allocation or categorization decision into its case-by-case liability determinant. In other words, the risk-utility analysis mandated by section 520 becomes determinative of both the allocation model and the operational rule.

Assume secondly, and in the alternative, that prior Xanadu precedent exists, establishing that gas transportation is indeed an ul-

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be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977)

75. *See generally* Williams v. Amoco Prod. Co., 734 P.2d 1113 (Kan. 1987) (denying application of §§ 519-520 to natural gas transmission); Mahowald v. Minnesota Gas Co., 344 N.W.2d 856, 862 (Minn. 1984) (same); New Meadows Holding Co. v. Washington Water Power Co., 687 P.2d 212 (Wash. 1984) (same). *Cf.* Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972) (strict liability imposed on transportation of gasoline by road). *See also* Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982) (refusing to hold utility company absolutely liable when its activity of transmitting electricity caused injury).

76. Of course, this assumes that the Xanadu court has some sense of precedent.

trahazardous activity.[77] What would be left for the court to decide in our hypothetical case? On the assumption that there was no factual doubt that our case involved gas transportation, the court would be left with a simple causation inquiry. However, making liability dependent solely upon a showing of cause is a strong indicia of an absolute rather than a strict liability allocation model.[78]

In both scenarios the logical progression from allocation model to logically derived operational rules is supplanted by self-referencing circularity.[79] In both cases vertical collapse hinders cogent prediction of liability determinations.

B. *Horizontal Collapse*

The second kind of collapse occurs when what are arguably discrete operational rules are collapsed or intermingled. Typically this will involve two or more first-order operational rules; i.e., the basic doctrinal elements of a tort.

Assume that Xanadu has long populated its negligence tort with, inter alia, the apparently discrete doctrinal elements of duty, risk-assessment, contributory (or comparative) negligence, and assumption of risk. Assume further that the Xanadu courts have appreciated for some time that implied assumption of risk[80] has affinities to both duty and contributory negligence;[81] Xanadu courts frequently have referred

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77. Assumedly, such precedent was premised on § 520. *Cf.* Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1211 (Alaska 1978) (moving blasting cases from case-by-case § 520 consideration to categorical determination that blasting is ultrahazardous activity).

78. As has been said of Rylands v. Fletcher, [1861-73] All E.R. 1 (H.L. 1868), *aff'g* L.R. 1 Ex. 265 (1866), the historical antecedent to §§ 519-520, "*Rylands* looks only to the resulting harm and creates absolute liability on the part of the defendant and no negligence or defect need be shown." Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 684 (W. Va. 1979). Notwithstanding, some courts refer to *Rylands* liability as of the absolute variety. *See, e.g., Yukon*, 585 P.2d at 1207-08.

79. Vertical collapse explains the confusion between strict liability and negligence. *See* Palmer, *supra* note 21, at 1304-08.

80. In contrast to express assumption of risk dealing with contractual disclaimers. *See, e.g.*, Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (Cal. 1963) (holding invalid an express release from future negligence as a condition of admission to a charitable hospital because it affected a public interest); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781 (Colo. 1989) (holding exculpatory clause valid notwithstanding failure to expressly use the terms "negligence" and "breach of warranty"); Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986) (upholding express release signed by skydiving student in favor of her instructors). Even courts that have collapsed implied assumption into other doctrinal elements have tended to reserve express assumption. *See, e.g.*, Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1130 (La. 1988); Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983).

81. *See, e.g.*, Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). The

to the duty-resembling assumption as "primary" and the plaintiff misconduct assumption of risks as "secondary." However, since both an absence of duty and a finding of contributory negligence traditionally would bar the plaintiff's claim,[82] the distinction between primary and secondary assumption did not come to the forefront of discussion until comparative fault principles began their assault on plaintiff misconduct doctrine. Thus, when Xanadu adopted comparative fault, the supreme court simultaneously endorsed the horizontal collapse of the heretofore distinct operational rules with the following statement:

> We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.[83]

The question arises, however, whether Xanadu was correct in collapsing assumption of risk into duty and comparative negligence—whether assumption of risk really had involved a double doctrinal redundancy. Little concern seems to have been engendered by collapsing primary assumption into duty. Clearly, both are conclusory labels with approximately the same function of designating general fact patterns in which the net loss reallocation will be zero.

The debate over the collapse of secondary assumption into comparative negligence has been joined more forcefully.[84] Of course, it is

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court stated:

> [A]ssumption of risk has two distinct meanings. In one sense (sometimes called its "primary" sense), it is an alternate expression for the proposition that defendant was not negligent, *i.e.*, either owed no duty or did not breach the duty owed. In its other sense (sometimes called "secondary"), assumption of risk is an affirmative defense to an established breach of duty. In its primary sense, it is accurate to say plaintiff assumed the risk whether or not he was "at fault", for the truth thereby expressed in alternate terminology is that defendant was not negligent. But in its secondary sense, *i.e.*, as an affirmative defense to an established breach of defendant's duty, it is incorrect to say plaintiff assumed the risk whether or not he was at fault.

Id.

82. *See, e.g.*, Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983).

83. Of course the quote actually is from Li v. Yellow Cab Co., 532 P.2d 1227, 1241 (Cal. 1975). *See also* Blackburn v. Dorta, 348 So. 2d 287, 293 (Fla. 1977).

84. The debate is not new. *See, e.g.*, Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 17-18 (1906) (arguing that "[i]t is essential that the two ideas should be kept quite distinct"); Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 723 (1953) (comparing contributory negligence and negligence). *See also* David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in*

difficult to argue redundancy when the indicted concepts are susceptible to discrete definition. Referenced to an objective test, "[c]ontributory negligence was described as the inadvertent or unintentional failure of the plaintiff to exercise due care for his own safety."[85] In contrast, assumption of risk is "purportedly distinguishable from contributory negligence because it [is] governed by a subjective test, which require[s] an inquiry into whether the plaintiff *actually knew* of the risk and voluntarily confronted the danger."[86] Nevertheless, the well documented overlap between the two defenses made it difficult for courts to resist collapse.[87] As a result, eschewing doctrinal richness for procedural simplicity, Xanadu and many other jurisdictions have forfeited the ability to fine tune and particularize their messages of displeasure at plaintiff misconduct.

A few courts have staged something of a rearguard action. Notwithstanding their grudging acceptance of the collapse of primary assumption into duty and overlapping secondary assumption into comparative fault, these courts have argued for an uncollapsed species of assumption of risk styled "reasonable implied assumption of risk."[88] The core of this defensive argument is that "the plaintiff's *reasonable conduct* in encountering a known danger raises the inference that he has agreed to relieve the defendant of his duty of care,"[89] as distinct from the "*unreasonable* assumption of risk" that overlaps with comparative negligence.

In fact, the resulting dispute itself involves competing models of horizontal collapse. At first blush, the argument for a discrete "reasonable conduct" defense appears to call for uncollapsing the assumption of risk defense (*secondary* assumption), permitting courts once again to

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Negligence and Strict Liability Litigation in Louisiana, 44 LA. L. REV. 1341, 1373 (1984) (arguing that "[t]he only agreeable resolution is abolition of assumed risk as a defense separate from comparative fault"); Kenneth W. Simons, *Assumption Of Risk And Consent In The Law Of Torts: A Theory Of Full Preference*, 67 B.U. L. REV. 213, 270-71 (1987) (arguing that comparative fault should not absorb assumption of risk); Matthew J. Toddy, Comment, *Assumption of Risk Merged with Contributory Negligence:* Anderson v. Ceccardi, 45 OHIO ST L.J 1059, 1070-71 (1984) (arguing that comparative negligence should absorb assumption of risk).

85. Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1127 (La. 1988).

86. *Id.* at 1127-28.

87. *Id.* at 1128 ("A conceptual difficulty arises from the fact that a plaintiff who knowingly and voluntarily encounters an unreasonable risk of injury may usually be described as one whose conduct has fallen below the standard of due care which would be exercised by a reasonable man under similar circumstances.").

88. *See, e.g.*, Von Beltz v. Stuntman, Inc., 255 Cal. Rptr. 755, 759-60 (1989).

89. *Id.* at 760 (emphasis added).

associate specific deterrence messages with certain types of plaintiff misconduct. In reality, the argument for "reasonable implied assumption of risk" seeks to uncollapse aspects of *primary* assumption of risk. This would resemble a fact-intensive primary assumption of risk (i.e. duty) inquiry.[90] Thus, while purporting to *uncollapse* assumption of risk, an acceptance of "reasonable implied assumption of risk" would tend to collapse abstract duty determinations into fact-intensive plaintiff knowledge/conduct inquiries.[91] Not surprisingly, this uncollapse-by-collapsing approach has been resisted.[92]

C. *Distinguishing Synergy from Collapse*

Although a world of distinct components seems attractive from a rigid analytical standpoint, reality intrudes. Allocation models and operational rules are discrete but not isolated concepts; they exhibit a useful synergy. Such synergy should not be equated with collapse, although it can precede it.

The primary reason for this synergy is that our present allocation models are quite gross. In the world of socially desirable conduct, we have only three recognized allocation models: negligence, strict liability, and absolute liability. Only occasionally does it seem that an additional model, such as "stricter liability,"[93] might develop.

As a result, the delineation of the exact amount of redistribution

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90. If it is accepted that (a) primary assumption is equivalent to a no-duty argument, and (b) duty/no-duty arguments are abstract, this is a misnomer.

91. *See infra* text accompanying note 255.

92. For example, in Knight v. Jewett, 834 P.2d 696 (Cal. 1992), the court noted:

> Such an approach not only would be inconsistent with the principles of fairness . . ., but also would be inimical to the fair and efficient administration of justice. If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for . . . it frequently will be easy to raise factual questions with regard to a *particular* plaintiff's *subjective* expectations as to the *existence* and *magnitude* of the risks the plaintiff voluntarily chose to encounter. By contrast, the question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury. Thus, the question of assumption of risk is much more amenable to resolution by summary judgment under a duty analysis than under the dissenting opinion's suggested implied consent approach.

Id. at 702 (citation omitted). *See also* Ford v. Gouin, 834 P.2d 724 (Cal. 1992) (companion case to *Knight*). *Cf. Knight*, 834 P.2d at 712-13 (Mosk, J., concurring in part and dissenting in part) (arguing for the elimination of the assumption-of-risk doctrine).

93. *See infra* text accompanying notes 151-54. *See also* Terry, *supra* note 42, at 14-21 (explaining the development of strict liability).

expected of a fact pattern is passed off to the labels of our better known first-order operational rules. For example, take the basic allocation models for socially desirable, yet injury-producing, activities. Assume that a court has decided to permit a cause of action concerning two distinct physician-patient fact patterns. Both involve injuries allegedly suffered by patients as a result of the acts or omissions of physicians—the first as a result of the manner in which a surgical procedure was performed, the second flowing from a physician's failure to inform the patient of the risks of the procedure.

Assume further that for various structural or meta-legal reasons, the court decides to place both fact patterns in the negligence allocation model.[94] However, the court believes that more informed-consent risks should be redistributed rather than surgical risks.[95] Therefore, the two fact patterns appear within the same model, but with importantly different allocational intentions.

The solution to this crisis of labeling is to use the appropriate operational rules as pointers toward the degree of redistribution. For example, within negligence there are three broad first-order operational rules. The least redistributive is custom,[96] the most is risk-utility,[97] with the reasonable person standard occupying some middle ground. As a result, unnamed and unnameable allocation model specifics become known by reference to their operational rule surrogates.[98]

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94. This seems to be the almost unassailable common law position, beginning with Slater v. Baker & Stapleton, 95 Eng. Rep. 860, 863 (K.B. 1767) and Cross v. Guthery, 2 Root 90, 91 (Conn. 1794), and surviving the movement away from a locality rule, Small v. Howard, 128 Mass. 131, 136 (1880), *overruled by* Brune v. Belinkoff, 235 N.E.2d 793 (Mass. 1968), to a national standard of care, Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979); Brune v. Belinkoff, 235 N.E.2d 793 (Mass. 1968); Hall v. Hilbun, 466 So. 2d 856, 870 (Miss. 1985). *Cf.* Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968) (Botter, J.S.C., dissenting), *aff'd*, 250 A.2d 129 (N.J. 1969). *See generally* Hoven v. Kelble, 256 N.W.2d 379 (Wis. 1977).

95. This comports with the majority position. *See, e.g.*, Cobbs v. Grant, 502 P.2d 1, 10 (Cal.), *cert denied*, 409 U.S. 1064 (1972). *See also* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Largey v. Rothman, 540 A.2d 504 (N.J. 1988).

96. After Vaughan v. Menlove, [1835-42] All E.R. 156 (Ct. Common Pleas), rejected a subjective, good-faith standard of care in favor of a "reasonable man of ordinary prudence" standard for negligence law, the most subjective (and hence least distributive) judgmental standard is custom. In addition, professional negligence cases typically require expert testimony, placing an additional burden on plaintiff.

97. Risk-utility is generally the most redistributive because it is the least subjective and the most objective standard by which to judge conduct.

98. A similar approach is taken in positioning fact patterns between allocation models. For example, Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978), kept "in-flight injuries to aircraft passengers caused by turbulence" fact patterns within negligence, but moved "aircraft crash" fact patterns to an intermediate status by utilizing a burden-shifting version of res ipsa

Indeed, there is a symbiotic relationship between an allocation model and its operational rules, for the latter constantly further define and inform the allocation model whose work they seek to accomplish. This relationship is dynamic as well as informational.

The dynamic element in the allocation-model/operational-rules dichotomy is a paradoxical function of model and rules being unsynchronized. At one level this incongruity can engender confusion and distrust, as tort law appears overly susceptible to characterization and manipulation. However, at another level, the dynamic, dialogic nature of the relationship provides the vehicle for the continued casuistic development of the common law of torts.

This latter attribute was demonstrated by Levi with his classic exposition of the doctrinal development of Anglo-American product liability law in the nineteenth and early twentieth centuries.[99] Levi studied the breakdown of the "inherently dangerous" rule. This rule operated as an exception to the privity rule. In its broad effect the privity rule held that a product liability plaintiff could not bring her negligence claim against a remote manufacturer.[100] Levi traced the development of the inherently dangerous exception from its first hesitant steps,[101] through its initial judicial endorsement,[102] to its consumption of the privity rule. This last stage occurred when Judge Cardozo, in *MacPherson v. Buick Motor Co.*,[103] held that all defective products were to be included within the "exceptional" category.[104] From this,

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loquitur.

99. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1949). *See also* Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 676-77 (W. Va. 1979).

100. The court in *Winterbottom v. Wright* noted that:

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

152 Eng. Rep. 402, 405 (Ex. 1842); *see also* LeBourdais v. Vitrified Wheel Co., 80 N.E. 482, 483 (Mass. 1907); Loop v. Litchfield, 42 N.Y. 351 (1870); Earl v. Lubbock, 1 K.B. 253 (1905).

Winterbottom has also been explained on the basis of the omission-commission distinction in tort law: an actor has no duty to act, but if she does act she must do so carefully. *See* FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS 115 n.77, 236-37 (1926). Under this analysis the defendant in *Winterbottom* had not negligently repaired the coach, but at most had only breached its contract by failure to repair.

101. *E.g.*, Langridge v. Levy, 150 Eng. Rep. 863 (Ex. of Pleas 1837).

102. Longmeid v. Holliday, 155 Eng. Rep. 752 (Ex. 1851); Thomas v. Winchester, 6 N.Y. 396, 411 (1852).

103. 111 N.E. 1050 (N.Y. 1916).

104. *Id.* at 1054-55. This issue was to trouble Judge Cardozo again in Palsgraf v. Long Island

Levi exposed a classical common law developmental technique, that of rules being changed through the development of exceptions until, the exceptions outnumbering the non-exceptional cases, a breakthrough case fashioned a new rule modeled more on the exceptions.

Differently stated, the allocation model applied to the manufacturer-consumer fact pattern in the early nineteenth century called for zero redistribution; the operational rule giving this effect being a "no-duty" rule. However, operational rules began to be utilized (exceptions based on fraud[105] and failure to warn,[106] along with the dangerous per se category examined by Levi[107]) which were inconsistent with the allocation model. By the time of Judge Cardozo's intervention in *MacPherson*, the allocation model and its operational rules were seriously out of alignment. Cardozo could have rejected the exceptional operational rules or changed the allocation model; he chose the latter.

This pattern repeats in the twentieth century. *MacPherson's* negligence allocation model for product-related injuries adopted standard negligence operational rules.[108] However, by the mid-1960s courts had made subtle modifications to the negligence operational rules (such as the rejection of custom as conclusive[109] and the utilization of res ipsa loquitur[110]) and fundamental changes to overlapping warranty law (such as the re-abandonment of vertical privity by using a dangerous

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R.R. Co., 162 N.E. 99 (N.Y. 1928). In Britain, Lord Atkin went one step further, directly countering the privity rule, and fashioning a general duty of care from the remains of the inherently dangerous exception. Donoghue v. Stevenson. [1932] All E.R. 1 (H.L.). In *Donoghue*, the plaintiff drank a ginger beer and ice cream float purchased by a friend from the defendant tavern-owner. Allegedly, when the friend poured the last of the ginger beer over the plaintiff's ice cream, the remains of a decomposed snail floated out of the bottle. The court held the manufacturer could be liable notwithstanding the lack of privity. As stated by Lord Atkin,

> [A] manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Id. at 20.

105. *E.g.*, Langridge v. Levy, 150 Eng. Rep. 863 (Ex. 1837).

106. *E.g.*, Heaven v. Pender, 11 Q.B.D. 503 (1883).

107. For a slightly different statement of the exceptional cases, see Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903).

108. 111 N.E. at 1053, 1055.

109. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.) ("[Industry] never may set its own tests, however persuasive be its usages."), *cert. denied*, 287 U.S. 662 (1932).

110. Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944). *See also* Baxter v. Ford Motor Co., 12 P.2d 409 (Wash. 1932) (strict liability on seller of chattels irrespective of either privity or absence of fraud or negligence). *Baxter* was adopted by the ALI in the Second Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965).

per se categorization,[111] and the attack on sellers' disclaimers of liability[112]). As a result, the courts were redistributing more product-related risks than contemplated by the allocation model. That inconsistency was remedied by *Greenman v. Yuba Power Products, Inc.*[113] and the prescient ALI with section 402A, changing the allocation model to strict liability and regaining consistency between the allocation model and its operational rules.[114]

Allocation models and operational rules require a healthy dialogue. It is only when that dialogue becomes fatally unbalanced that there is collapse.

IV. COLLAPSED AND UNCOLLAPSED TORTS

Although the distinctions between vertical and horizontal collapse and between collapse and synergy are reasonably clear, the other major variable in the collapse matrix, the degree of collapse experienced by any one tort in any one jurisdiction at any one time, is less capable of precise rendering. Nevertheless, some relatively intuitive distinctions can be made using the nomenclature of "highly collapsed," "partially collapsed," and "uncollapsed." With the caveat that all torts structures tend to exhibit some degree of collapse, or at least an overlapping of

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111. *See* Prosser, *Assault upon the Citadel, supra* note 17, at 1110-14. *See generally* Prosser, *Fall of the Citadel, supra* note 17.

112. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

113. *See supra* text accompanying note 50.

114. Strikingly similar doctrinal developments occurred in medical malpractice law during the 1970s. *See, e.g.*, Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (holding that hospitals can be held strictly liable for nonprofessional services); Clark v. Gibbons, 426 P.2d 525, 535 (Cal. 1967) (Tobriner, J., concurring) (stating that a jury instruction on conditional res ipsa loquitur was proper in an operation room accident); Helling v. Carey, 519 P.2d 981, 984 (Wash. 1974) (Utter, J., concurring) (arguing for a greater duty of care when there exists a simple, well-known harmless test such as a glaucoma test). After those *Escola*-like balloons were floated, the literature blossomed, focusing both on rationales for a shift in allocation models and suggesting operational rules. *See, e.g.*, Michael M. Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661. *See also* Frank J. Vandall, *Applying Strict Liability to Professionals: Economic and Legal Analysis*, 59 IND. L.J. 25 (1983). However, unlike product liability, malpractice law failed to make the final move to strict liability. *See* Nicolas P. Terry, *The Malpractice Crisis in the United States: A Dispatch From the Trenches*, 2 PROF. NEGL. 145, 149-50 (1986). Thus, strict liability in the malpractice field has been restricted to a few legislative interventions. *See, e.g.*, The Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. § 38.2-5000 (Michie 1990). Ironically, the recent interest in practice guidelines as operational rules may well lead to renewed interest in a different, presumably stricter allocation model. *See, e.g.*, Clark C. Havighurst, *Practice Guidelines for Medical Care: The Policy Rationale*, 34 ST. LOUIS U. L.J. 777 (1990); Richard E. Leahy, *Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CAL. L. REV. 1483 (1989).

their doctrinal structures, it is the uncollapsed category that is the simplest to illustrate.

A. *Uncollapsed Torts*

1. Design Defect Product Liability Cases

Design defect cases have demonstrated a resolve first to extricate themselves from any vertical collapse,[115] and second to have studiously avoided a horizontal collapse. As previously discussed,[116] twentieth-century product liability doctrine exhibited a clear determination to shift the manufacturer-consumer/personal-or-property injury fact pattern away from the negligence allocation model. However, considerable hurdles lay ahead. First, the seminal judicial discussion of the future allocation model was phrased in terms of absolute liability.[117] Second, neither the negligence-sounding operational rule of section 402A[118] nor the stark, almost absolute-sounding *Greenman*,[119] suggested that there were grounds for optimism in avoiding collapse.

However, and as generally accepted, collapse was averted because of two major developments. First, a surprising judicial consensus rapidly developed that the allocation model should be a strict liability one; that is, design-defect product liability would eschew both causation (absolute)[120] and producer-conduct (negligence)[121] allocation models. Second, the courts moved with alacrity to develop consistent operational rules for design cases.

Initially, the Restatement's "consumer expectations" test for legal defectiveness[122] proved to be a misstep, susceptible to interpretations

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115. *See supra* text accompanying note 50.

116. *See supra* text accompanying notes 108-14.

117. Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). However, the opinion is ambiguous at best as to whether absolute liability as we now know it was being contemplated, or was merely considered synonymous with strict liability.

118. *See supra* note 56.

119. *Cf.* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

120. *See, e.g.*, Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 845-46 (N.H. 1978) ("Unlike workmen's compensation and no-fault automobile insurance, strict liability is not a no-fault system of compensation."). *Cf.* Kirkland v. General Motors Corp., 521 P.2d 1353, 1363 (Okla. 1974).

121. *Cf.* Friend v. General Motors Corp., 165 S.E.2d 734, 738 (Ga. Ct. App. 1968) (Pannell, J., dissenting), *cert. denied*, 167 S.E.2d 926 (Ga. 1969), *rev'd by* GA. CODE ANN. § 105-106 (Harrison 1968). *See also* Casrell v. Altec Indus., Inc., 335 So. 2d 128 (Ala. 1976) (negligence as a matter of law).

122. For a discussion of legal defectiveness, see Terry, *supra* note 42, at 21-24.

inconsistent with the strict liability allocation model.[123] Today, most jurisdictions either have explicitly adopted a risk-utility test for legal defectiveness,[124] or at least recognize that "consumer expectations" is a conclusory label for a performed risk-utility analysis.[125] Given its objective, impersonal approach to liability, the adoption of risk-utility as the test for legal defectiveness clearly was consistent with the increased distribution demanded by the new allocation model. However, it was not by itself decisive, because twentieth-century accident law strongly associated risk-utility analysis with a negligence allocation model.[126] To counter this perception, courts began to move the focus of the risk-utility analysis from the producer to the product.[127]

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123. At one extreme the test may be interpreted as more appropriate for an absolute liability allocation model. *E.g.*, Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967) (consumers do not expect any defects). At the other extreme it may be interpreted as an inquiry into what manufacturers believe consumers expect, and so more consistent with a custom-influenced operational rule and hence a negligence allocation model.

124. *See supra* text accompanying notes 47-63 (discussing the development of California law). *See also* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 877 (Alaska 1979); Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410, 414 (Colo. 1986); O'Brien v. Muskin Corp., 463 A.2d 298, 303 (N.J. 1983).

125. *See, e.g.*, Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975). *Cf.* Fahy v. Dresser Indus., Inc., 740 S.W.2d 635 (Mo. 1987), *cert. denied*, 485 U.S. 1022 (1988); Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986) (en banc).

126. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Learned Hand, J.). Posner's "rediscovery" of the Hand formula reinforced that linkage. *See generally* Richard A. Posner, *A Theory Of Negligence*, 1 J. LEG. STUD. 29, 32 (1972). Indeed, the risk-utility approach was invoked to recall custom and hence reduced redistribution. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 131 (1987) ("The adoption of a safety practice by most members of the industry shows that its cost is less than its expected benefit in accident avoidance; there is no reason for the industry to adopt the practice otherwise."). *See also* Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987).

It is accepted that strict products doctrine developed from negligence and, as a result, "[a]lmost since the [strict liability] rule's inception, courts have tended to borrow common law concepts of negligence in determining whether a manufactured product, as designed, is unreasonably dangerous." Kallio v. Ford Motor Co., 407 N.W.2d 92, 95 (Minn. 1987). Nevertheless, it is inaccurate to describe the strict liability risk-utility analysis as "the reasonable care balancing test." *Id.*

127. See, e.g., *Dart v. Wiebe Mfg., Inc.*, where the court stated that:

> We believe that there is a fundamental difference in the application of a risk/benefit analysis in a negligent design case and the same analysis in a strict liability design case. The difference is significant, for it shifts the central focus of the inquiry from the *conduct* of the manufacturer (negligence) to *the quality of the product* (strict liability). Negligence theory concerns itself with determining whether the conduct of the defendant was reasonable in view of the foreseeable risk of injury; strict liability is concerned with whether the product itself was unreasonably dangerous.

709 P.2d 876, 880 (Ariz. 1985); *see also* Brown v. Superior Court, 751 P.2d 470, 474 (Cal. 1988); Woodill v. Parke Davis & Co., 402 N.E.2d 194 (Ill. 1980); St. Germain v. Husqvarna Corp., 544

Conceptually, however, the more important breakthrough, as far as operational rules for design cases are concerned, was the adoption of the imputed-foresight rule.[128] If the adoption of risk-utility, with its ties to negligence, guaranteed that there would not be absolute liability, so the adoption of imputed foresight—a concept antithetical to negligence's actual or constructive rule for risk assessment—guaranteed equally that design defect cases would not fall back into the clutches of the negligence allocation model. These constructs continue to dominate modern design-defect theory and practice.[129] In short the design-defect cause of action has both resisted vertical collapse and evolved operational rules that are distinct and generally resistant to horizontal collapse.[130]

B. *Highly Collapsed Torts*

1. Ultrahazardous Activity-Redux

As discussed above,[131] the ultrahazardous activity tort is an example of a vertical, fully collapsed tort, in that its allocation model and operational rules are collapsed into a single, fact-sensitive determination. Of course, section 520 *could* have evolved into a more abstract determinant for the inclusion of fact patterns into a strict liability allocation model.[132] This is apparently the case with the special liability rule for aircraft-caused ground damage[133] contained in section 520A.[134]

A.2d 1283, 1285 (Me. 1988); Miles Labs., Inc. v. Doe, 556 A.2d 1107, 1113 (Md. 1989); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982); Fischer v. Johns-Manville Corp., 512 A.2d 466, 472 (N.J. 1986); Mauch v. Manufacturers Sales & Serv., Inc., 345 N.W.2d 338, 347 (N.D. 1984); Lenhardt v. Ford Motor Co., 683 P.2d 1097, 1099 (Wash. 1984).

128. *See, e.g.*, Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036 (Or. 1974); *see also* Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 880-81 (Ariz. 1985); St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1286-88 (Me. 1988) (Glassman, J., dissenting). *See generally* Terry, *supra* note 22.

129. *See, e.g.*, *In re* Haw. Fed. Asbestos Cases, 665 F. Supp. 1454, 1456-58 (D. Haw. 1986) ("state of the art" evidence of the unknowability of a product-related risk at the time of manufacture is irrelevant); Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059, 1061-63 (Alaska 1979) (importing negligence concepts into design-defect strict-liability charge warranted reversal); Johnson v. Raybestos-Manhattan, Inc., 740 P.2d 548, 549 (Haw. 1987) ("state of the art" evidence not admissible for the purpose of showing whether the seller knew of the dangerousness of the product); Lenhardt v. Ford Motor Co., 683 P.2d 1097, 1098 (Wash. 1984) ("state of the art" evidence of industry custom at the time of manufacture is irrelevant).

130. One of the few windows of potential collapse was in the risk of confusion between imputed foresight of *risk* and plaintiff's obligation to prove foresight of *use*. The possibility of confusion was minimized by Newman v. Utility Trailer & Equip. Co., 564 P.2d 674, 675-77 (Or. 1977).

131. *See supra* text accompanying notes 66-79.

132. *See supra* text accompanying notes 76-78.

133. In contrast, say, to injuries suffered by passengers. *See generally* 3 FOWLER V. HARPER

Section 520A suffers from a fundamental problem: it was something of an historical mistake. In spite of its eventual placement as a coda to the ultrahazardous tort, strict liability for aircraft damage had its genesis in intentional tort law.[135] The clue, of course, is that section 520A liability basically is limited to occasions of aircraft *intrusion* onto the property of another; as a child of trespass to land, it does not provide for general aircraft liability.[136]

In the early twentieth century, the premodern intentional torts were struggling to find an identity. At one time the only tort model of note, the intentional model, was in the process of retrenchment. As negligence flourished both intellectually and practically in the wake of high profile cases such as *Donoghue v. Stevenson*,[137] *MacPherson v. Buick Motor Co.*,[138] and *Palsgraf v. Long Island Railroad Co.*,[139] the intentional torts were forced to re-group around the concept of deterring socially unacceptable conduct.

Realignment did not proceed without some false steps. Traditional intentional tort law did not require intent to harm, only an intent to do the act.[140] A mere entry onto another's land, therefore, involved liabil-

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ET AL., THE LAW OF TORTS § 14.13, at 286-307 (2d ed. 1986).

134. Section 520A provides:

> If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft,
>
> (a) the operator of the aircraft is subject to liability for the harm, even though he has exercised the utmost care to prevent it, and
>
> (b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation.

RESTATEMENT (SECOND) OF TORTS § 520A (1977).

135. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 13, 78, at 78-82, 556-59 (5th ed. 1984); 3 HARPER ET AL., *supra* note 133, § 14.13.

136. *See* Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978) (doctrine of res ipsa loquitur was applicable in a wrongful death action by plaintiff's decedents, even where some testimony of actual negligence existed); Newing v. Cheatham, 540 P.2d 33 (Cal. 1975) (allowing plaintiff to recover for wrongful death with a res ipsa loquitur ruling against the pilot/owner of a downed aircraft that arguably crashed as a result of fuel exhaustion).

137. [1932] All E.R. 1 (H.L.).

138. 111 N.E. 1050 (N.Y. 1916).

139. 162 N.E. 99 (N.Y. 1928).

140. The confusion over motive is a result of the Restatement's use of the phrase "intending to cause a harmful or offensive contact." RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1964). The key to understanding this provision is that "harmful or offensive" objectively qualifies contact, not intent. *See, e.g.*, Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (N.J. Super. Ct. App. Div. 1951); Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp., 413 S.E.2d 79 (W. Va. 1991). It provides an objective test for contact, enabling courts to characterize mere incidental touchings. *Cf.* Vosburg v. Putney, 50 N.W. 403 (Wis. 1891) (using "implied license"

ity.[141] As such, the nonaccidental entry over land of an airplane, and any resulting damage seemed suspiciously like a trespass. The famous case of *Rochester Gas & Electric Corp. v. Dunlop* went further, finding trespass but justifying that decision with some quaint but nevertheless contentious allocational language:

> If . . . common experience requires the . . . conclusion . . . that, no matter how perfectly constructed or how carefully managed an aeroplane may be, it may still fall, then the man who takes it over another's land and kills his cow or knocks off his chimney has committed an inexcusable trespass. It must be kept in mind that, when damage occurs in such a case, one or the other party has to stand it, and no reason readily suggests itself why it should not be the one who has brought about the chance occurrence. . . . To hold that the defendant here is absolved from liability, because he was himself free from negligence, is to hazard all the chimneys in the land, as well as live stock on the farms, and even the people in their homes. The other alternative seems by far the more reasonable, namely: Such chance as there may be that a properly equipped and well-handled aeroplane may still crash upon and injure private property shall be borne by him who takes the machine aloft.[142]

This curious admixture of trespass and strict liability led the drafters of the First Restatement to condemn air transport under *both* theories.

The trespass theory was effectively gutted by the Second Restate-

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characterization for incidental touching). *See generally* KEETON ET AL., *supra* note 135, § 13.

141. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Vowell Constr. Co., 341 S.W.2d 148 (Tex. 1960) (holding that the cutting by a street paving contractor of a telephone cable lawfully in place beneath the surface of the ground was a trespass).

> The gist of trespass to personalty is an injury to, or interference with, possession, unlawfully, with or without the exercise of physical force.
>
> . . . . Here, the scraper was deliberately and intentionally used in making a cut to the designated subgrade. The telephone cable was lawfully in place. The molesting or severing of the cable was a violation of a property right which gave rise to a cause of action regardless of negligence. The particular appellation or classification to be given the particular act is not of controlling effect. The important thing is that a property right was violated.

Id. (citations omitted). This approach was consistent with the very earliest trespass-to-land cases. *See, e.g*, Smith v. Stone, 82 Eng. Rep. 533 (K.B. 1647) (trespass not committed when defendant was carried onto land against his will). *See generally* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 253-56 (1969).

142. 266 N.Y.S. 469, 473 (Monroe County Ct. 1933).

ment.[143] However, the strict liability theory survived into the Second Restatement as section 520A.[144] Although continually peppered with attacks,[145] the most interesting commentary on section 520A is provided by the relatively recent case of *Crosby v. Cox Aircraft Co.*[146] *Crosby* was a typical land damage case, an aircraft having crash-landed on the plaintiff's garage. The majority opinion recognized that the tide had been turning against the imposition of strict liability for land damage.[147] As to the appropriate allocation model the court stated:

> The causes of aircraft accidents are legion and can come from a myriad of sources. Every aircraft that flies is at risk from every bird, projectile and other aircraft. Accidents may be caused by improper placement of wires or buildings or from failure to properly mark and light such obstructions. The injury to the ground dweller may have been caused by faulty engineering, construction, repair, maintenance, metal fatigue, operation or ground control. Lightning, wind shear and other acts of God may have brought about a crash. Any listing of the causes of such accidents undoubtedly would fall short of the possibilities. In such circumstances the imposition of liability should be upon the blameworthy party who can be shown

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143. Section 159 provides:

(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth.

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the air space next to the land, and

(b) it interferes substantially with the other's use and enjoyment of his land.

RESTATEMENT (SECOND) OF TORTS § 159 (1964).

144. *See generally* 3 HARPER ET AL., *supra* note 133, § 14.13.

145. *See, e.g.*, Wood v. United Air Lines, Inc., 223 N.Y.S.2d 692, 697 (N.Y. Sup. Ct. 1961) ("[I]n light of the technical progress achieved in the design, construction, operation and maintenance of aircraft generally, . . . flying should no longer be deemed to be an ultrahazardous activity, requiring the imposition of absolute liability for any damage or injury caused in the course thereof.").

146. 746 P.2d 1198 (Wash. 1987).

147. The court noted that:

The number of states imposing strict liability has diminished significantly. At present, only six states retain the rule, and even these states apply it only to the owner of the aircraft . . . .

The modern trend followed by a majority of states is to impose liability only upon a showing of negligence by either the aircraft owner or operator.

Id. at 1200 (citations omitted).

to be at fault.[148]

Yet, seeking to bolster this argument, the court relied upon the liability determinants from the (already) collapsed sections 519-520.[149] In determining that aircraft-caused land damage was not an ultrahazardous activity, *Crosby* succeeded in unraveling the historical confusion of the previous half-decade. Unfortunately, the technique it chose for this estimable task was to recollapse section 520A into sections 519-520, thus atomizing the section 520A allocation model.[150]

2. Unreasonably Dangerous Products

Although the expression "absolute liability" twice escaped Justice Traynor's lips in *Escola*,[151] contemporary product liability lawyers have become more sensitive to the distinctions between strict and absolute liability,[152] and have found something of a comfort zone with the former type of liability. Indeed, and as alluded to above,[153] little progress

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148. *Id.* at 1201; *see also* Huddleston v. Union Rural Elec. Ass'n, 821 P.2d 862 (Colo. Ct. App. 1992). Compare the dissenting opinion of Justice Brachtenbach in *Crosby*: "[I]nnocent persons on the ground are entitled to protection. Who better to provide it than the enterprise for whose purpose and benefit the danger was created." 746 P.2d at 1208 (Brachtenbach, J., dissenting).

149. Concluding that "[a]viation is an activity of 'common usage,' it is appropriately conducted over populated areas, and its value to the community outweighs its dangerous attributes. Indeed, aviation is an integral part of modern society." 746 P.2d at 1201.

150. Justice Brachtenbach noted this unfortunate circumstance in his dissent:

> This result ignores the very scheme of these interrelated sections. Section 519 declares the general principle of liability; § 520 lists the factors to be considered in determining whether an activity is abnormally dangerous. Section 520A declares a special rule to ground damage. What the majority overlooks is that the authors of the Restatement (Second) of Torts in 1977 expressly intended that § 520A stand on its own, *i.e.*, that it in fact was a special rule, quite distinct from § 520 requirements.
>
> . . . The majority attempts to buttress its result by an analysis of each factor listed in § 520, finding most to be lacking. Such analysis is irrelevant in light of the language in the comments and of the history of § 520A.

746 P.2d at 1205-06 (Brachtenbach, J., dissenting).

151. Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) ("In my opinion it should now be recognized that a manufacturer incurs an *absolute liability* when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.") (emphasis added). *See also id.* at 441-42 ("The retailer, even though not equipped to test a product, is under an *absolute liability* to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product.") (emphasis added).

152. *See, e.g.*, Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 845-46 (N.H. 1978) ("Unlike workmen's compensation and no-fault automobile insurance, strict liability is not a no-fault system of compensation").

153. *See supra* note 92.

has been made toward a product liability allocation model designed to redistribute a larger number of product-related injuries than the accepted strict liability system. Although warning cases began to develop stricter *operational* rules, the resultant inconsistency with the allocation model now seems likely to be resolved in favor of reduced, rather than increased, or "stricter" liability.[154]

Notwithstanding, some pioneering work has been done on the "stricter" frontier. Both Maryland and Louisiana developed stricter regimes in the mid-1980s. Although they experimented with ostensibly different approaches—Maryland appearing to use a "single product" (handguns) rule, Louisiana adopting a hybrid category for ultra-dangerous products—both ended in failure. Importantly, these failures can be blamed in large part on the adoption of collapsed liability models.

The well known Maryland case of *Kelley v. R.G. Industries, Inc.*,[155] concerned injuries suffered by the plaintiff store-owner when he was shot by a criminal using a "Saturday Night Special" manufactured and imported by the defendants. The court rejected both the plaintiff's ultrahazardous activity (marketing the gun)[156] and strict product liability claims.[157]

Nevertheless, the court proceeded to develop a novel basis for imposing liability, albeit a theory closely related to section 402A. The court concluded that:

> While the fact that a handgun is a Saturday Night Special may not bring its manufacturer or marketer within any of the previously existing theories of strict liability . . . , we have repeatedly pointed out that the common law adapts to fit the

154. *See infra* text accompanying notes 196-201.

155. 497 A.2d 1143 (Md. 1985).

156. The §§ 519-520 claim was rejected on the basis that "the abnormally dangerous activity doctrine [does not extend] to instances in which the alleged tortfeasor is not an owner or occupier of land . . . . The thrust of the doctrine is that the activity be abnormally dangerous in relation to the area where it occurs." *Id.* at 1147. This position is consistent with the Second Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 520 cmt. e (1977). A slightly different way of expressing this limitation on the doctrine is to maintain the distinction between product liability and ultrahazardous activities. *See* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (addressing "the distinction between strict liability for selling unreasonably dangerous *products* and strict liability for engaging in ultrahazardous *activities* by making the sale of a product an activity[]"). *See also* Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989) ("marketing of a handgun not dangerous in and of itself").

157. The court rejected the plaintiff's § 402A claim on the basis that, "regardless of the standard used to determine whether a product is 'defective' under § 402A, a handgun which functions as intended and as expected is not 'defective' within the meaning of that section." 497 A.2d at 1149.

> needs of society. *Consequently, we shall recognize a separate, limited area of strict liability for the manufacturers, as well as all in the marketing chain, of Saturday Night Specials.*[158]

The meta-legal reasoning that the Maryland court found compelling in endorsing this new allocation model went to both the product and the producer. As to the former, the court could think of little positive to say about such a weapon.[159] As to its manufacturer, familiar reallocational language was invoked, as follows:

> [T]he manufacturer or marketer of a Saturday Night Special knows or ought to know that the chief use of the product is for criminal activity. Such criminal use, and the virtual absence of legitimate uses for the product, are clearly foreseeable by the manufacturers and sellers of Saturday Night Specials.
>
> Moreover, as between the manufacturer or marketer of a Saturday Night Special, who places among the public a product that will be used chiefly in criminal activity, and the innocent victim of such misuse, the former is certainly more at

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158. *Id.* at 1159 (emphasis added); *see also Anti-Gun Forces Step Up Effort to Hold Sellers Liable*, N.Y. TIMES, Nov. 5, 1991, at A23. *See generally* Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103 (1991); Patrick S. Davies, Note, *Saturday Night Specials: A "Special" Exception In Strict Liability Law*, 61 NOTRE DAME L. REV. 478 (1986); H. Todd Iveson, Note, *Manufacturers' Liability To Victims Of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771 (1983); Rick L. Jett, Note, *Do Victims Of Unlawful Handgun Violence Have A Remedy Against Handgun Manufacturers: An Overview And Analysis*, 1985 U. ILL. L. REV. 967; Matthew S. Steffey, Note, *Manufacturers' Or Marketers' Liability For The Criminal Use Of Saturday Night Specials: A New Common Law Approach*—Kelley v. R.G. Industries, 14 FLA. ST. U. L. REV. 149 (1986); Susan M. Stevens, Note, Kelley v. R.G Industries: *When Hard Cases Make Good Law*, 46 MD. L. REV. 486 (1987).

159. The court stated:

> There is, however, a limited category of handguns which clearly is not sanctioned as a matter of public policy. To impose strict liability upon the manufacturers and marketers of these handguns, in instances of gunshot wounds caused by criminal use, would not be contrary to the policy embodied in the enactments of the General Assembly. . . . [Their] characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses . . . . They are too inaccurate, unreliable and poorly made for use by law enforcement personnel, sportsmen, homeowners or businessmen . . . . The chief "value" a Saturday Night Special handgun has is in criminal activity, because of its easy concealability and low price. Obviously, the use of a handgun in the commission of a crime is not a "legitimate" use justified by State policy. To the contrary, the Legislature has expressly declared that the criminal use of a handgun is a separate crime that carries a mandatory sentence of not less than five years imprisonment.

497 A.2d at 1153-58.

fault than the latter.[160]

Note that the court itself labels this model as one of strict liability[161] and recognizes its novel character. However, what fact patterns are to be associated with this model? Reminiscent of sections 519-520, the approach is fatally collapsed, in that the allocation is made on a case-by-case basis rather than in more abstract or general terms.

Kelley gives every indication that it is a single-product rule, in that the only fact pattern that the court has considered for this allocation model involves criminal use of handguns. However, the court did not say anything that would close off the later expansion of liability to other fact patterns.[162]

The only doctrinal specifics in which the court would indulge were some operational considerations for identifying the guns that would fall under the stricter regime—characteristics such as low quality and federal proscription.[163] Although apparently designed for case-by-case implementation, these are not operational rules in the sense used herein. Rather, they are highly specific tools for allocating the fact pattern to the new allocation model. Although more traditional second-order operational rules were to apply to plaintiff misconduct,[164] the court limited its fact-pattern identification to the following:

> [O]nce the trier of facts determines that a handgun is a Saturday Night Special, then liability may be imposed against a manufacturer or anyone else in the marketing chain, including the retailer. Liability may only be imposed, however, when the plaintiff or plaintiff's decedent suffers injury or death because he is shot with the Saturday Night Special. In addition, the shooting must be a criminal act. The shooting itself may be

160. *Id.* at 1159 (citations omitted).

161. *Id.* The court's apparent adoption of the 'imputed foresight' strict liability operational rule also is significant.

162. Recall the growth of inherently dangerous product subcategories in both the nineteenth and twentieth centuries, functioning as doctrinal development tools. *See supra* text accompanying notes 98-110.

163. 497 A.2d at 1160.

164. The court stated:

> Although neither contributory negligence nor assumption of the risk will be recognized as defenses, nevertheless the plaintiff must not be a participant in the criminal activity. If the foregoing elements are satisfied, then the defendant shall be liable for all resulting damages suffered by the gunshot victim, consistent with the established law concerning tort damages.

Id.

> the sole criminal act, or it may occur in the course of another crime where the person firing the Saturday Night Special is one of the perpetrators of the crime.[165]

Kelley was not warmly received in its own[166] or other jurisdictions.[167] Most critiques have focused on the apparent absence of the requirement to prove a factual defect—a first-order operational rule in products cases. Typical of the critical jurisprudence is *Diggles v. Horwitz*.[168] A patient at a mental health facility committed suicide by shooting himself with the semi-automatic pistol he had just purchased at a pawn shop. While the court did not rule out the possibility of a negligence action against the owner of the pawn shop, it held that neither strict product liability nor ultrahazardous activity action would lie against the retailer or the manufacturer of the gun. In the words of the perceptive concurrence, "[u]nder present decisional precedents in our State, there cannot be a recovery based on products liability . . . unless the product, itself, contains a defect."[169] In other words, the product worked all too well.

As can be seen from *Diggles*, the inability to demonstrate a factual defect provides a facially reasonable argument for denying claims against products that are intentionally (guns) or inevitably (cigarettes, alcohol) dangerous. Yet, the argument presupposes limiting our defect characterization to a warranty-inspired "does not work" approach. An alternate characterization might be that these products indeed do have a defect: their inherent and identifiable dangerousness. In other words, are courts that assert that the plaintiff failed to identify a factual defect in the product making a factual determination from the record or a normative judgment that such dangerousness cannot constitute a defect? If courts *are* favoring a "lack of factual defect" argument, are

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165. *Id.*

166. A subsequently enacted Maryland statute provides:

> A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

MD. ANN. CODE art. 27, § 36-I(h)(1) (1992).

167. *See, e.g.*, Coulson v. DeAngelo, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); King v. R.G. Indus., Inc., 451 N.W.2d 874 (Mich. Ct. App. 1989); Richardson v. Holland, 741 S.W.2d 751 (Mo. Ct. App. 1987); Delahanty v. Hinckley, 564 A.2d 758 (Pa. Commw. Ct. 1989); Robertson v. Grogan Inv. Co., 710 S.W.2d 678 (Tex. Ct. App. 1986).

168. 765 S.W.2d 839 (Tex. Ct. App. 1989).

169. *Id.* at 843 (Brookshire, J., concurring).

they trying to avoid the complexities of the legal defectiveness issue in such cases? After all, any frontal assault on such a product involves a fundamental reformulation of our risk-utility approach to design defects. For example, plaintiff would be arguing that, notwithstanding the lack of any alternate design or manufacture, the product's dangerousness, although adequately warned against, outweighs its utility. Under this approach, our hypothetical reasonable manufacturer equipped with perfect information would conclude that the product should not be produced at all.[170]

Notwithstanding, the more fundamental objection is *Kelley's* fatal vertical collapse, the uncertainty as to what weapons would fit within the liability model. In the words of one court:

> [C]reation of such a doctrine is extremely problematic insofar as *which* manufacturers would be held liable. All firearms are capable of being used for criminal activity. Merely to impose liability upon the manufacturers of the cheapest types of handguns will not avoid that basic fact. Instead, claims against gun manufacturers will have the anomalous result that only persons shot with cheap guns will be able to recover, while those shot with expensive guns, admitted by the *Kelley* court to be more accurate and therefore deadlier, would take nothing.[171]

Kelley aside, the only explicit attempt to develop an overtly[172]

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170. Such a position runs counter to the Second Restatement, which states:

> Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk or harm, if only from over-consumption. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

171. Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *accord*, Delahanty v. Hinckley, 564 A.2d 758, 761-62 (D.C. 1989).

172. Some jurisdictions have developed a stricter form of liability by radicalizing their operational rules. Take, for example, the statement, "liability may be imposed without regard to the defendant's knowledge or conduct." Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 383 (Mo. 1986) (en banc), *rev'd in part by* MO. REV. STAT. § 537.764 (1988). Applied literally, such a rule has a profound impact on the scope of liability. For example, by denying a manufacturer the opportunity to contend that there was no feasible alternative design available, the scope

stricter allocation model for product liability cases has been in Louisiana. *Halphen v. Johns-Manville Sales Corp.*[173] recognized a novel category of defect allegation, and thereby a category of product that was "unreasonably dangerous per se." This not only placed Louisiana in the forefront of those jurisdictions taking a "stricter" approach to strict product liability,[174] but also melded civilian principles[175] with the com-

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of liability would seem more in keeping with absolute liability. *See generally* Terry, *supra* note 42, at 30-37.

Liability systems also may be made "stricter" in other ways. For example, a jurisdiction might choose to modify the burden of proof on causation. In a complex system such as modern products liability, changes in what appear to be relatively minor operational rules may have dramatic ramifications. Such has been the case with the admissibility of various types of evidence which, unfortunately, have been referred to by the single, collective description of "state of the art." *See generally* Terry, *supra* note 22. Of course, when the adoption of a liability rule has as profound effect on the scope of liability as some state-of-the-art rules have, there is a real danger that the rule of operation will cease to be consistent with the theory. When this occurs, it may be necessary to relabel the theory of liability itself for purposes of clarity.

173. 484 So. 2d 110, 113 (La. 1986), *answer conformed to* 788 F.2d 274, 275 (5th Cir. 1986), *modified in part by* Louisiana Products Liability Act of 1988, LA. REV STAT. ANN § 9:2800.51-.59 (West 1991). *See generally* William E. Crawford, *Torts:* Halphen v. Johns-Manville Sales Corp.—*Products Liability Rewritten*, 47 LA. L. REV. 485 (1986); William E. Crawford, Note, Halphen v. Johns-Manville Sales Corp.—*A New Product In the Area of Products Liability*, 47 LA. L. REV. 637 (1987).

174. *See generally* Terry, *supra* note 42.

175. Specifically, the Louisiana Civil Code provides, "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, *or of the things which we have in our custody* . . . ." LA. CIV CODE ANN. art. 2317 (West 1973) (emphasis added). Thus, *Halphen* concluded:

> The principle of strict products liability is analogous to the principle of legal fault or strict liability underlying civil code articles 2317-22. The manufacturer who places an unreasonably dangerous product on the market that causes injury to innocent victims is subject to strict liability even if he has not been guilty of any negligence. The liability arises from his legal relationship to the product and is based on the product's unreasonably dangerous condition. One of the reasons for strict products liability is similar to that underlying the codal strict liability: The person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating thing bears the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of its defective condition.

484 So. 2d at 116-17; *see also* Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971), *overruled by* Dorry v. Lafleur, 399 So. 2d 559 (La. 1981); Loescher v. Parr, 324 So. 2d 441 (La. 1975); Palmer, *supra* note 21, at 1334-54. *See generally* J. CALAIS-AULOY, CONSUMER LEGISLATION IN FRANCE 28-29 (1981).

Louisiana's products doctrine had been influenced from the start by codal principles. *See, e.g.*, Bell v. Jet Wheel Blast, 462 So. 2d 166, 170-71 (La.), *answer conformed to* 755 F.2d 1146 (5th Cir. 1985). The *Bell* court stated:

> Our products liability rule is consistent with the Code's underlying reasons for imposing a legal obligation when a quasi-offense causes damage to another: there is always, either in the person of the creditor or in his patrimony, a circumstance which renders such creation necessary, and such circumstance is nothing other than the unjust injury which must

mon law of product liability for the first time.[176]

Halphen described its novel category of product liability allegation, the classification of a product as "unreasonably dangerous per se," as follows:

> For products in this category liability may be imposed solely on the basis of the intrinsic characteristics of the product irrespective of the manufacturer's intent, knowledge or conduct. This category should be acknowledged as giving rise to the purest form of strict liability and clearly distinguished from other theories in which the manufacturer's knowledge or conduct is an issue.
>
> A product is unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. This theory considers the product's danger-in-fact, not whether the manufacturer perceived or could have perceived the danger, because the theory's purpose is to evaluate the product itself, not the manufacturer's conduct. Likewise, the benefits are those actually found to flow from the use of the product, rather than as perceived at the time the product was designed and marketed.[177]

As with *Kelley*, this new form of liability is vertically collapsed. The Supreme Court of Louisiana did hint at a stricter allocation model, implying that its per se characterization would involve the redistribution of more product-related injuries than under conventional strict products liability[178] or, a fortiori, under negligence. However, *Halphen* failed to define the fact pattern to which this increased redistribution would apply. Further, and similarly characteristic of vertical collapse, *Halphen* failed to provide any doctrinal mechanism to control case-by-

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be avoided, if it has not yet occurred, or to repair it, if it has already happened. 462 So. 2d at 170-71.

176. Even European federal product liability law seems to owe more to American common law than civilian law. *See, e.g.*, 1985 O.J. (L 210) 29 (utilizing a consumer-expectations type test for liability); *see also* Joseph W. Little, *Rationalization of the Law of Product Liability*, 36 U. FLA. L. REV. 1 (1984).

177. 484 So. 2d at 113-14 (citations omitted).

178. Note that Louisiana courts have consistently distinguished between absolute liability and liability posited on article 2317 of the Civil Code. *See, e.g.*, Entrevia v. Hood, 427 So. 2d 1146, 1151 (La. 1983) (Lemmon, J., concurring); Kent v. Gulf States Utils. Co., 418 So. 2d 493, 501 (La. 1982) (Dennis, J., concurring); Buckbee v. United Gas Pipeline Co., 542 So. 2d 81, 84-85 (La. Ct. App. 1989), *cert. granted*, 590 So. 2d 580 (La. 1992).

case redistribution.[179]

While it seems likely that *Halphen* intended to redistribute more risks associated with "unreasonably dangerous per se" products than other products presumably controlled by the traditional defect allegations, we are told neither the identity of the products that fit within this special category, nor which of the risks associated with such products will be redistributed.[180] Collapsing the operational rules and allocation model in this fashion provides for an unsatisfactory liability model. Because manufacturers are unable to make any liability projections, the system is dramatically robbed of its deterrence potential. Moreover, the increased information costs inherent in a case-by-case determination of product exposure would create inefficiencies in the insurance market.[181]

What lies at the foundation of *Halphen's* "unreasonably dangerous per se" characterization is a judicial conclusion that some products

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179. Compare Justice Dennis' concurrence in *Kent*:

> In strict liability, except for the element of the defendant's knowledge, the test is the same as that for negligence. In negligence, allowance is made for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act. In strict liability, however, knowledge of the condition of the product is imputed to the defendant before the balancing test or negligence test is applied. In products liability, for example, a product is considered unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect. Thus, assuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market? This is another way of posing the question of whether the product presents an unreasonable risk of injury. And it may be the most useful way of presenting it.

Kent, 418 So. 2d at 501 (Dennis, J., concurring) (citations omitted).

180. The confusion is highlighted by the *Halphen* court's admission that the "unreasonably dangerous per se" category was identical with one of the sub-types of its design defect cases: "A product may be unreasonably dangerous because of its design for any one of three reasons: (1) A reasonable person would conclude that the danger in fact, whether foreseeable or not, outweighs the utility of the product. This is the same danger-utility test applied in determining whether a product is unreasonably dangerous per se." 484 So. 2d at 115 (citations omitted).

181. This critique of *Halphen* should not be taken simply as directed against increased redistribution of product-related injuries. Indeed, Louisiana adopted such an example of almost absolute liability with regard to exploding bottles in Robertson v. Gulf South Beverage, Inc., 421 So. 2d 877 (La. 1982). *Cf.* Lescale v. Louisiana Coca-Cola Bottling Co., Ltd., 422 So. 2d 241 (La. Ct. App. 1982) (affirming damages awarded for cuts sustained opening a can of soda). Whether or not that rule is valid on efficiency or deterrence grounds, it is logically supportable and is exempt from the critique visited upon *Halphen*. This is because *Robertson* both defined the fact pattern that was to be subjected to increased redistribution (exploding bottles), and provided the distributional test to be applied on a case-by-case basis, as follows:

> [W]e find it unnecessary to decide whether the bottle exploded spontaneously or whether it exploded when struck. We do not hold that a person may never be barred from recovery by striking or dropping a bottle with a force sufficient to cause it to explode. *The inquiry, in such cases, would always be whether the bottle was in normal use.*

421 So. 2d at 879 (emphasis added).

fail the risk-utility test so badly that they should not be marketed even with a warning. This stricter form of liability was distinguished by two significant modifications to Louisiana's products doctrine. First, *Halphen's* danger-utility test was very different from those used in products liability cases in other jurisdictions.[182] *Halphen's* danger-utility test was just that—a direct computation involving the product's actual danger and actual utility. The feasibility and availability of alternate products or designs were not in issue.[183]

The vertically collapsed *Halphen* left undefined the products that are "unreasonably dangerous per se." One starting point should have been the *Halphen* product—asbestos. However, the court did not specifically announce that asbestos was an "unreasonably dangerous per se" product.[184] Of course, legislation[185] brought the category to an untimely end before courts could work out effective operational rules. However, even traditional casuistic development seemed uncomfortable with the unreasonably dangerous characterization.[186]

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182. *See Halpen*, 484 So. 2d at 114 n.2.

183. *Cf.* Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978). The *Wilson* court described the role of the court:

> [T]he court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. The trial court should not permit an allegation of design defect to go to the jury unless there is sufficient evidence upon which to make this determination.

Id. at 1326. *See also* Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 815-16 (La. 1987) (noting that if the utility of the product *does* outweigh danger (*i.e.*, the product is not "unreasonably dangerous per se") the product may still be unreasonably dangerous if there is a feasible alternative design).

184. Notwithstanding, the Court of Appeals for the Fifth Circuit seemed to harbor few reservations as to the implications of the discussion in *Halphen*. As the Fifth Circuit noted: "We claim no prescience as to the universe of products which ultimately will be given the cognomen 'unreasonably dangerous per se,' but we find it apparent from the citations and discussion in the certification response that the Supreme Court of Louisiana places asbestos in that category." Halphen v. Johns-Manville Sales Corp., 788 F.2d 274, 275 (5th Cir. 1986).

185. Louisiana Products Liability Act of 1988, LA. REV. STAT. ANN. § 9:2800.54 (West 1991). However, see Gilboy v. American Tobacco Co., 582 So. 2d 1263 (La. 1991), in which Justice Dennis, author of the *Halphen* opinion, concurred but preferred "not to express an opinion as to whether the risks or utility of tobacco use are enormous or nil. Also, strictly speaking, the Legislature may repeal or change law but it cannot overrule or reverse decisions of the courts interpreting the law." *Id.* at 1266 (Dennis, J., concurring).

186. The following cases resisted the per se characterization: Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1097 (5th Cir. 1991) (pyrolitic carbon heart valves); Miles v. Olin Corp., 922 F.2d 1221, 1224-25 (5th Cir. 1991) (Winchester model 37 single-shot shotgun); Valenti v. Surgitek-Flash Medical Eng'r Corp., 875 F.2d 466, 467-68 (5th Cir. 1989) (penile prosthesis); Williams v. Ciba-Geigy Corp., 686 F. Supp. 573, 577 (W.D. La. 1988) (prescription drug); Brown v. Sears, Roebuck & Co., 514 So. 2d 439, 442 (La. 1987) (escalator); Sharkey v. Sterling Drug, Inc., 600 So. 2d 701, 707 (La. Ct. App. 1992) (aspirin). *Cf.* McCoy v. Otis Elevator Co., 546 So. 2d 229,

Halphen itself favored an open risk-utility analysis.[187] However, in the words of one court,

> [I]t is presumptively inappropriate for a jury to apply the pure risk-utility test of "unreasonably dangerous per se" to a known and warned-of risk of a prescription drug. Such risks have already been considered in the arduous risk-utility scrutiny of the expert Food and Drug Administration's approval procedures. The plaintiff desirous of having such a risk submitted to a jury must affirmatively show the propriety of the court's so doing. Rather than simply permitting juries to apply, haphazardly and case-by-case, the risk-utility test whenever harm results, the court must require, as a part of the plaintiff's burden of producing evidence, an articulable basis for disregarding the FDA's determination that the drug should be available.[188]

As with *Kelley's* "Saturday Night Special," the obvious objection once again is plaintiff's failure to identify a factual defect. The generally unsuccessful counter is that the defendant's product should be judged by a "pure" risk-utility analysis, where the product, rather than its factually identified defect, is subjected to the analysis.[189]

The Second Restatement suggests another major weakness in such cases—the obviousness of the danger.[190] However, a frontal attack has been mounted on the Restatement's position in cigarette cases.[191]

230-31 (La. Ct. App. 1989) (freight elevator unreasonably dangerous per se).

187. *See supra* text accompanying note 177.

188. *Williams*, 686 F. Supp. at 577.

189. *See, e.g.*, Baughn v. Honda Motor Co., Ltd., 727 P.2d 655, 660-61 (Wash. 1986) (children riding mini-trailbike on public roadway).

190. Comment j to § 402A states that:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . . . But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger or potentiality of danger, is generally known and recognized.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (citing the "dangers of alcoholic beverages" as an example).

191. *See, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990) (rejecting "good tobacco" argument). *See also* Mary Griffen, Note, *The Smoldering Issue In* Cipollone v. Liggett Group, Inc.*: Process Concerns In Determining Whether Cigarettes Are A Defectively Designed Product*, 73 CORNELL L. REV. 606 (1988). *See generally* Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992); Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufac-*

While *Cipollone v. Liggett Group, Inc.*[192] decided that some state failure-to-warn causes of action are preempted by the Federal Cigarette Labeling and Advertising Act, the Court did not address any broader attack based on a dangerous per se characterization.[193] A similar debate is shaping up in the case of manufacturer liability for selling alcohol.[194] Again, the doctrinal focus tends to be on the manufacturer's duty to warn of, what are argued to be, non-obvious risks. Equally, the waters are muddied by federal legislation and preemption arguments.[195] The reality of the litigation, however, is a focus on a product

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turers, 52 OHIO ST. L.J. 405 (1991).

192. 112 S. Ct. 2608 (1992). *Cipollone* concerned state damage claims for breach of express warranty, failure to warn, fraudulent concealment, and conspiracy. The manufacturer argued preemption based on the Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282, and the 1969 amendment to Act, Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1340 (1988)). The Court was unanimous in holding that § 5 of the 1965 Act did not preempt the state damage actions. *Id.* at 2622-23. However, there was less unanimity regarding the more generally worded § 5(b) of the 1969 Act. Justices Scalia and Thomas considered that all of the petitioner's claims were preempted. *Id.* at 2637 (Scalia, J., concurring in the judgment in part and dissenting in part). Justices Blackmun, Kennedy, and Souter considered that none of the claims were preempted. *Id.* at 2626 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The key opinion was that of Justice Stevens, who was joined by Chief Justice Rehnquist and Justices White and O'Connor, holding that § 5(b) preempted the petitioner's failure to warn theories and the allegation of fraudulent misrepresentation relating to attempting to neutralize the federally mandated warnings. However, the express warranty claims, a more broadly stated fraudulent misrepresentation/disclosure allegation, and the conspiracy claim survived the preemption argument. *Id.* at 2619-22. *Cipollone* was voluntarily dismissed by the plaintiff on November 5, 1992, reportedly because of the pressure of mounting costs on the law firm representing the plaintiff.

193. Not surprisingly, given its per se rule, Louisiana has seen its share of cigarette cases. *See, e.g.*, Pennington v. Vistron Corp., 876 F.2d 414, 425 (5th Cir. 1989) (holding that the Federal Cigarette Labeling Act did not preempt plaintiff's per se claim, but declining to rule whether cigarettes were per se unreasonably dangerous); Gilboy v. American Tobacco Co., 572 So. 2d 289, 291-92 (La. Ct. App.) (holding that, as a matter of law, cigarettes are not unreasonably dangerous per se and affirming summary judgment for cigarette manufacturers), *rev'd*, 582 So. 2d 1263, 1264 (La. 1991) ("Since normal use of cigarettes causes lung cancer, the risk of smoking cigarettes is enormous, while its utility is virtually nil. . . . Using *Halphen's* risk/utility test, a jury must determine whether cigarettes are unreasonably dangerous per se.").

194. *See* Natalie K. Chetlin, Comment, *In support of* Hon v. Stroh Brewery Co.*: A Brewing Debate Over Extending Liability To Manufacturers of Alcoholic Beverages*, 51 U. PITT. L. REV. 179 (1989). *See also* Gina M. DeDominicis, Note, *No Duty At Any Speed?: Determining The Responsibility Of The Automobile Manufacturer In Speed-Related Accidents*, 14 HOFSTRA L. REV. 403 (1986). *See generally* James A. Henderson & Aaron D. Twerski, *Closing The American Products Liability Frontier: The Rejection Of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

195. In 1988 Congress passed the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-219 (1988), which mandates that all alcoholic beverages manufactured, imported, or bottled for sale or distribution in the U.S. to carry the following label: "GOVERNMENT WARNING: (1) Ac-

as having potential for liability because of its "non-defective" yet inherent dangerousness,[196] a riddle that is denied solution in the vertically collapsed approaches suggested so far.

3. Product Liability Warning Cases

Occasionally a court will use the collapse technique as part of a broader strategy concerning the structure of a cause of action. A prime example is a tactic employed by the Supreme Court of New Jersey in the well known case of *Beshada v. Johns-Manville Products Corp.*[197]

Recall that most jurisdictions, albeit with varying levels of candor, have adopted a risk-utility test for legal defectiveness in product liability *design* cases. The use of this test is consistent with a strict liability allocation model; some products will pass the test, but fewer than in negligence.[198] Another important operational rule in design cases is imputed foresight. The core of negligence liability is the unreasonable running of a foreseeable risk.[199] Thus, the requirement of actual or con-

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cording to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." 27 U.S.C. § 215.

Section 216 of the Act contains preemptive language which may preclude state law challenges to a manufacture's duty to warn. *See* Carter H. Dukes, *Alcohol Manufacturers and The Duty To Warn: An Analysis of Recent Case Law in Light of The Alcoholic Beverage Labeling Act of 1988*, 38 EMORY. L.J. 1189, 1206-12 (1989) (discussing preemption and drawing an analogy to the Cigarette Labeling and Advertising Act of 1965); *see also* Sheila L. Birnbaum & Gary E. Crawford, *How* Cipollone *Affects Other Industries*, NAT'L L.J., Aug. 24, 1992 at 20, 22.

196. *See* Northern Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1355 (9th Cir. 1992) (fetal alcohol syndrome due to drinking during pregnancy), *cert denied*, 112 S. Ct. 3033 (1992) (suit subsequently voluntarily dismissed); Debra C. Moss, *Parents Sue Liquor Companies*, A.B.A. J., Mar. 1, 1989, at 17. *Cf.* Hon v. Stroh Brewery Co., 835 F.2d 510, 514 (3d Cir. 1987) (pancreatitis from moderate and prolonged beer consumption a risk not known to consumer or consuming public); Smith v. Anheuser-Busch, Inc., 599 A.2d 320 (R.I. 1991) (action against brewer alleging that defendant's advertising encouraged driving while intoxicated dismissed); Schmidt v. Centex Beverage, Inc., 825 S.W.2d 791 (Tex. Ct. App. 1992) (action against distributor by trespasser injured by intoxicated volunteers at music festival dismissed because distributor owed no duty to trespasser); Brune v. Brown Forman Corp., 758 S.W.2d 827, 831 (Tex. Ct. App. 1988) (refusing to rule that "the general public is aware that the consumption of an excessive amount of alcohol can result in death," thus precluding summary judgment in tequila overdose case, with a resulting $1.5 million jury verdict, *see* WALL ST. J., Oct. 1, 1992, at B8). *See generally* Garrison v. Heublin, Inc., 673 F.2d 189 (7th Cir. 1982) (risk of injuries associated with alcoholism is common knowledge such that alcohol is not unreasonably dangerous); Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 570 (Iowa 1986) (risk of intoxication sufficiently known to consumers at large); Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (danger of developing alcoholism within ordinary knowledge common to the general community).

197. 447 A.2d 539 (N.J. 1982).

198. *See supra* text accompanying notes 123-27.

199. *See, e.g.*, Blyth v. Birmingham Water Works Co., 156 Eng. Rep. 1047, 1049 (Ex. Ch.

structive foresight of risk is an explicit component of negligence-based products liability.[200] However, in *strict liability* design cases, producer foresight has been replaced with a conclusive presumption that the manufacturer knew of the risks associated with its product (imputed foresight).[201]

While design-defect jurisprudence carefully moved down an uncollapsed path, product liability warning cases faced a much more uncertain future.[202] Courts seemed to have difficulty agreeing on any operational rule in warning cases other than negligence-based "adequacy."[203] Indeed, there was little agreement whether the strict liability allocation model extended to warning cases.[204] By the early 1980s, two crucial decisions had to be made concerning the warning cause of action: first, whether foresight was to be imputed and, second, whether the adequacy test for defectiveness was to be conduct oriented or product oriented. The need to determine both issues was driven by questions relating to the admissibility of certain state-of-the-art evidence.[205]

Beshada was one of the first cases to openly confront these issues. Unfortunately, it did not so much confront as collapse them. The court began by noting that "[w]hen plaintiffs urge that a product is hazardous because it lacks a warning, they . . . [say] in effect that regardless of the overall cost-benefit calculation the product is unsafe because a warning could make it safer at virtually no added cost and without limiting its utility."[206] Then, led by a defense argument that unknowability is relevant to the adequacy determination,[207] the court

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1856) (water company not negligent for failing to foresee and prevent water main accident "the cause of which was so obscure that it was not discovered until many months after the accident had occurred[]"); *see also* RESTATEMENT (SECOND) OF TORTS § 284 (1965).

200. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965).

201. *See, e.g.*, Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 375 n.4 (Mo. 1986); Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036-37 (Or. 1974). This is distinct from the issue of foresight of use. *See, e.g.*, Newman v. Utility Trailer & Equip. Co., 564 P.2d 674, 675-77 (Or. 1977).

202. *See generally* Henderson & Twerski, *supra* note 8; Terry, *supra* note 22, at 298-307.

203. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). *See, e.g.*, Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1182-83 (Ohio 1990).

204. *Cf.* Little v. PPG Indus., Inc., 594 P.2d 911, 914 (Wash. 1979) (applying strict liability).

205. An imputed-foresight rule renders irrelevant defensive evidence of an absence of industry knowledge of a risk. A product-oriented adequacy rule renders irrelevant defensive evidence of industry custom. *See generally* Terry, *supra* note 22, at 290-91.

206. Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 545 (N.J. 1982).

207. *Id.* at 546 ("Defendants conceptualize the scientific unknowability of the dangerous propensities of a product as a technological barrier to making the product safer by providing warnings.").

concluded:

> When the defendants argue that it is unreasonable to impose a duty on them to warn of the unknowable, they misconstrue both the purpose and effect of strict liability. By imposing strict liability, we are not requiring defendants to have done something that is impossible. In this sense, the phrase "duty to warn" is misleading. It implies negligence concepts with their attendant focus on the reasonableness of defendant's behavior. However, a major concern of strict liability—ignored by defendants—is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them.[208]

Beshada's virtual collapse of adequacy and imputed foresight was purposeful. Against the collapsed operational rules, defendant's arguments were easily characterizeable as endorsing a wholesale return to negligence principles, a position that *Beshada* clearly could reject. However, in horizontally collapsing warning doctrine, *Beshada* set a trap for itself. If arguing against the collapsed operational rules exposed defendants to accusations of favoring a negligence allocation model, then those collapsed rules could themselves be attacked as being more consistent with an absolute, rather than a strict, liability model.

At this point three potential routes open up. First, the courts could recognize that indeed some form of stricter liability should be contemplated for a limited number of ultra-dangerous prodı cts.[209] Second, the courts could uncollapse the operational rules in warning cases, maintaining imputed foresight, but designing real content into "adequacy," thus reducing the number of redistributions to a level consistent with a strict liability model.[210] Third, courts could come to view *Beshada's* operational rules as unjustifiably involving absolute liability and, because of the trap set in *Beshada*, incapable of uncollapsed reform. This third position would result in a judicial abandonment of a strict liability allocation model for warning cases in favor of a negligence-based allocation model. Recent cases suggest that this particular trap, which *Beshada* set for itself, is now being sprung.[211]

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208. *Id.* at 546.

209. Indeed, the next major New Jersey case, Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984), *rev'd on other grounds*, 592 A.2d 1176 (N.J. 1991), left open such a possibility when it restricted *Beshada* to its own facts—asbestos. *Id.* at 387-88.

210. *See* Terry, *supra* note 22, at 301.

211. *See, e.g.*, Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 553-60 (Cal.

C. *Partially Collapsed Torts*

Fully collapsed torts such as ultrahazardous activity are the exception rather than the rule. More prevalent are partially collapsed torts, typically exhibiting a horizontal collapse.

1. Negligence Per Se

The statutory violation (negligence per se) case frequently is considered one of the simplest types of negligence cases. The basic premise of negligence per se is that the breach of some criminal or regulatory norm may be an appropriate substitute for other first-order approaches to the standard of care.[212] As is well known, there are three basic types of regulatory statutes (or standards):[213] first, statutes that explicitly add civil consequences to their primary criminal or administrative penalties;[214] second, statutes that explicitly prohibit[215] or limit[216] civil consequences flowing from breach of the statute; and, third, statutes that are silent on the issue. Negligence per se doctrine concerns only the third category of statutes.[217]

1991) (discussing failure-to-warn theory of strict liability). *See generally* Henderson & Twerski, *supra* note 8.

212. *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965), providing, "[t]he standard of conduct of a reasonable man may be . . . (b) *adopted by the court from a legislative enactment or an administrative regulation which does not so provide*" (emphasis added); *cf.* French v. Willman, 599 A.2d 1151, 1152 (Me. 1991) (Maine does not recognize negligence per se). "The present rule in Maine is 'that violation of a safety statute is not negligence per se, but only evidence of negligence.' " *Id.* (quoting Dongo v. Banks 448 A.2d 885, 889 (Me. 1982)).

213. *See generally* Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781 (1990).

214. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2072 (1988) (civil suit for breach of consumer safety regulations); N.Y. GEN. OBLIG. LAW § 11-101(1) (McKinney 1978) (civil dram shop action).

215. *See, e.g.*, LA. REV. STAT. ANN. § 32:295.1 (West 1989) (breach of seatbelt statute is not contributory negligence).

216. *See, e.g.*, MO. ANN. STAT. § 307.178.3(2) (Vernon Supp. 1992) (breach of seatbelt statute shall not operate to reduce damages by more than one percent).

217. Of course, even when a court holds a statute *not* to have per se effects, the breach of the statute will still constitute relevant evidence of uncollapsed negligence. See, e.g., the Illinois supreme court's statement in *Kalata v. Anheuser-Busch Cos.*:

> A violation of a statute or ordinance designed to protect human life or property is *prima facie* evidence of negligence. A party injured by such a violation may recover only by showing that the violation proximately caused his injury and the statute or ordinance was intended to protect a class of persons to which he belongs from the kind of injury that he suffered. The violation does not constitute negligence per se, however, and therefore the defendant may prevail by showing that he acted reasonably under the circumstances.

581 N.E.2d 656, 661 (Ill. 1991) (citations omitted); *see also* French v. Willman, 599 A.2d 1151 (Me. 1991).

The question is how we identify statutes that have per se applicability. The classic doctrinal exposition is contained in *Osborne v. McMasters*,[218] a case imposing liability on a pharmacist for supplying plaintiff's decedent with unlabelled poison, in violation of a state statute. For the *Osborne* court, the issue was quite uncomplicated:

> It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.[219]

Ever eager to endorse the facile, the Second Restatement chimes in with the following:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.[220]

Obviously, these statements of the law are impossibly conclusory. They inform us of none of the criteria that distinguish the statutes that do protect the plaintiff or her interests in a particular case from those that do not.[221]

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218. 41 N.W. 543 (Minn. 1889).

219. *Id.* at 543.

220. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

221. Notwithstanding, the *Osborne*-Restatement position is still given currency. *See, e.g.*, Newport v. Moran, 721 P.2d 465, 467 (Or. Ct. App. 1986) ("Violation of an ordinance may be negligence per se if the violation is the cause of the injury, the plaintiff is within the class of persons intended to be protected by the legislation and the injury is within the area of risk intended to be avoided by the ordinance.") (citing Smith v. Portland Traction Co., 359 P.2d 899, 901 (Or. 1961)). *See also* Vu v. Singer Co., 538 F. Supp. 26, 33, (N.D. Cal. 1981) (holding that

The starting point for unraveling the negligence per se doctrine is to question what a plaintiff gains by arguing per se rather than "ordinary" negligence. Assume that a plaintiff is granted a per se instruction. What does the plaintiff still have to prove?

The answer is that the plaintiff only has to prove "breach" of the statute and cause in fact.[222] In this context, "breach" refers to the technical or factual part of breach—for example, whether the defendant sold the alcohol to a minor or whether the defendant left his automobile unlocked with the keys in the ignition. Crucially, breach here does not refer to the normative or standard-setting aspects of breach (hereinafter referred to as "normative breach"[223])—for example, whether selling the alcohol or leaving the keys is "wrong" or "negligent."[224]

If plaintiff has to prove only technical breach and cause in fact, it follows that a per se characterization of a statute is a conclusion that

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no standard of care was imposed either by statute or by defendant's handbook and that defendant had no duty either to protect or warn the surrounding community of the high-risk teenagers enrolled in defendant's job corps), *aff'd*, 706 F.2d 1027 (9th Cir.), *cert. denied*, 464 U.S. 938 (1983); Good v. City of Glendale, 722 P.2d 386, 389 (Ariz. Ct. App. 1986) (holding that plaintiff's negligent conduct did not cause the police to shoot him and stating that "[t]he purpose of the criminal statutes in question is to protect the police, as members of the public, from harm, not to protect the plaintiff, the alleged violator of the law, from harm . . . [but,] the violation of the enactment will not be negligence unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the other[]" (citations omitted)); Schlobohm v. United Parcel Serv., 804 P.2d 978, 982 (Kan. 1991) (holding that plaintiff was a member of the class of persons the code was designed to protect—"those persons . . . who enter and exit doorways"); Kansas State Bank v. Specialized Transp. Servs., 819 P.2d 587 (Kan. 1991) (child abuse reporting statute was for benefit of public as a whole, not discrete class of abused children, (" 'Statutes . . . enacted to protect the public . . . do not create a duty to individuals injured as a result of the statutory violation.' " (quoting *Schlobohm*, 804 P.2d at 981)); Lynn v. Overlook Dev., 403 S.E.2d 469 (N.C. 1991) (building code protects public at large, not particular purchasers); Whitlaw v. Kroger Co., 410 S.E.2d 251 (S.C. 1991) (declining "to extend the class of persons the statute is intended to protect to all persons to whom the purchasing minor may give or sell the alcohol[]") (plaintiff's son, killed when his car struck a tree, consumed alcohol provided to him by a third party, an "underage youth," who had purchased the beer at the defendant's place of business).

222. "As a general rule of statutory construction, a statute enacted for the safety and protection of the public can impose a specific requirement to do or not to do a particular act. . . . A violation of the former type constitutes negligence per se." Becker v. Shaull, 584 N.E.2d 684, 685-86 (Ohio 1992). Thus, the only factual determination for the jury is the commission or omission of the act prohibited or required. *See* Eisenhuth v. Moneyhon, 119 N.E.2d 440, 444 (Ohio 1954) ("by finding a single issue of fact").

223. Normative breach as used herein refers to two basic elements of "breach" or "standard of care": (1) constructive risk-assessment; and (2) the applicable level of standard of care applied to this fact pattern.

224. Whitlaw v. Kroger Co., 410 S.E.2d 251, 252 (S.C. 1991) (holding that if plaintiff then shows that the defendant violated that statute, he has proven the second element of a negligence cause of action, viz., that the defendant, by act or omission, failed to exercise due care).

the *other* elements of the traditional negligence prima facie case are satisfied. That is, when a judge characterizes a statute as having per se effects, she has actually determined the issues of duty, normative breach (risk identification and standard setting), and legal cause.[225] It follows that, other than for some basic fact finding, negligence per se is a collapsed version of the negligence tort.[226] This is a horizontal collapse, in which the three operational rules (duty, normative breach, and legal cause) have been collapsed into a single inquiry.[227]

Well known negligence per se cases support this conclusion. For example, in *Ross v. Hartman* the court referred to the defendant's conduct as follows: "This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or 'proximate' cause of the harm."[228] Similarly, the courts have confirmed that even with a statute having per se application, the plaintiff must prove factual causation.[229]

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225. *Cf.* Walter Probert, *Causation in the Negligence Jargon: A Plea for Balanced Realism*, 18 U. FLA. L. REV. 369, 379-81 (1965).

226. An extended version of this analysis is applicable to so-called "exceptional" statutes. *See* RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965) ("There are . . . exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves.") Exceptional statutes are per se statutes designed to protect, for example, minors against themselves. As such, it would be illogical to permit an affirmative defense to operate based upon the conduct of the minor-plaintiff. *See generally* Del E. Webb Corp. v. Superior Court, 726 P.2d 580, 583 (Ariz. 1986) (dram shop case); Crown v. Raymond, 764 P.2d 1146 (Ariz. Ct. App. 1988) (sale of gun to minor).

227. Although primarily an example of horizontal collapse, negligence per se does have some aspects of a vertical collapse. By definition, a negligence per se characterization almost always leads to liability in a particular case. However, the use of that allocation model is dependent upon a characterization that follows from the (in this case, collapsed) operational rules. The doctrine's allocational effect has caused at least one trial court to refuse the per se instruction for that reason alone. *See* Herbst v. Miller, 830 P.2d 1268 (Mont. 1992) (reversing a ruling for defendant and finding that the absence of a handrail along stairway that plaintiff fell down violated the building code and was negligence per se because a resolution attached to the code stated that it is unlawful to "maintain any building or structure . . . contrary to or in violation of any of the provisions of this Code[]").

228. 139 F.2d 14, 15 (D.C. Cir. 1943).

229. Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) ("We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury."); *see also* Madenford v. Interstate Lumber & Mill Corp., 153 Conn. 62, 64, 212 A.2d 588 (1965) ("The jury were not required to find that the plaintiff had sustained her burden of proving that the statutory violation constituted a proximate cause of the decedent's death."); Britton v. Wooten, 817 S.W.2d 443, 447 (Ky. 1991) ("Such violations of administrative regulations, like statutory violations, constitute negligence, per se, and the basis for liability if found to be a substantial factor in causing the result.").

Although some courts acknowledge that the question of whether a statute has per se effects raises questions essentially similar to an uncollapsed analysis,[230] in most per se litigation judicial deliberation of the collapsed issues is hidden, or "off-camera."[231] Notwithstanding, realization that the court is making a duty, normative breach, or legal cause decision in per se cases greatly improves the advocate's odds of making the right type of argument. What is disturbing, however, is

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In Brannan v. Nevada Rock & Sand Co., 823 P.2d 291 (Nev. 1992), plaintiff's motorcycle collided with one of defendant's dump trucks and plaintiff was seriously injured. As a result, plaintiff brought a negligence per se suit against defendant for failure to maintain the brakes on the company's truck. The court held that in order to successfully bring a negligence per se suit, plaintiff must prove two things: (1) that plaintiff was a member of the class to be protected; and (2) that there was a causal connection between defendant's negligence and plaintiff's injury. In this case, the jury was left to determine whether the brakes were improperly maintained in violation of the law and whether the faulty brakes were a proximate cause of the accident. *Id.* at 293. *See also* Lynn v. Overlook Dev., 403 S.E.2d 469, 473 (N.C. 1991) (holding that although the violation of a statute that imposes a duty upon the city building inspector in order to promote the safety of the public, including the plaintiffs, may be negligence per se, such negligence is actionable only if it is the proximate cause of injury to the plaintiff); *cf.* Peak v. Barlow Homes, Inc., 765 S.W.2d 577 (Ky. App. 1988) (defendant's violation of a service entrance regulation not the proximate cause of decedent's death); Whitlaw v. Kroger Co., 410 S.E.2d 251, 253 (S.C. 1991) ("Proximate cause requires proof of (1) causation in fact and (2) legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability. . . . A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.").

230. *See, e.g.*, Koback v. Crook, 366 N.W.2d 857, 859-61 (Wis. 1985) (discussing Sorensen v. Jarvis, 350 N.W.2d 108 (Wis. 1984)).

231. *See, e.g.*, Lyons v. Nasby, 770 P.2d 1250 (Colo. 1989). In a thoughtful opinion, the Colorado Supreme Court analyzed a straightforward common law negligence claim against a tavern-owner in terms of duty and proximate cause. With regard to the former, the court stated:

> In determining whether the law should impose a duty the court must consider several factors, including the extent, foreseeability and likelihood of injury, the social utility of the defendant's conduct, the magnitude of the burden placed on the defendant to guard against injury, and the consequences of placing that burden on the defendant.

Id. at 1254 (citation omitted). In discussing what it characterized as proximate cause, the court noted:

> Whether proximate cause exists is a question for the jury and only in the clearest of cases, where reasonable minds can draw but one inference from the evidence, does the question become one of law to be determined by the court. . . . While the chain of causation in some cases may be so attenuated that no proximate cause exists as a matter of law, such is not the case here.

Id. at 1256-57 (citation omitted). Notwithstanding its apparent comfort level with modern tort doctrine, the court's reasoning disappeared from view when it dealt with the petitioner's negligence per se allegation, adopting *Osborne*-like language: "The plaintiff must also show that he or she is a member of the class of persons whom the statute was intended to protect and that the injuries suffered were of the kind that the statute was enacted to prevent." *Id.* at 1257 (citation omitted).

that per se cases seem to exhibit something of a double collapse. Typically a court will concentrate on only one of the collapsed issues (duty, normative breach, or legal cause), as though the collapse has been taken as a signal for *simplifying* the decision-making process.

Some of the best illustrations of the varied approaches courts take to collapsed torts are to be found in the so-called dram shop cases. Most jurisdictions began with a common law no-liability rule premised on the proposition that third-party injuries were caused by *consuming* rather than *furnishing* the alcoholic beverage.[232] As jurisdictions rethought the no-liability rule (or negative allocation model), they used quite different modes of analysis. Compare the language from three cases all dealing with an essentially similar fact pattern.

Vesely v. Sager[233] concerned a motorist injured in an automobile accident with an allegedly drunk tavern patron. The court held the state's dram shop act to have per se effect:

> A duty of care, and the attendant standard of conduct required of a reasonable man, may of course be found in a legislative enactment which does not provide for civil liability. In this state a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute.
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> . . . .
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> . . . Our conclusion concerning the legislative purpose . . . is compelled by Business and Professions Code, which states that one of the purposes of the Alcoholic Beverage Control Act is to protect the safety of the people of this state. Moreover, our interpretation . . . finds support in the deci-

232. *See, e.g.*, Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Allen v. County of Westchester, 492 N.Y.S.2d 772 (App. Div.), *appeal dismissed*, 489 N.E.2d 773 (N.Y. 1985); Sorensen v. Jarvis, 350 N.W.2d 108, 111 (Wis. 1984). *Cf.* Reid v. Terwilliger, 22 N.E. 1091 (N.Y. 1889). In this dubious endeavor the courts have been joined by state legislatures. *See, e.g.*, CAL. CIV. CODE § 1714(b) (West 1985) ("[T]he furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."); MO. ANN. STAT. §537.053.2 (Vernon 1988) ("The legislature hereby declares . . . the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person."). *See also* Sigman v. Seafood Ltd., 817 P.2d 527, 530 (Colo. 1991) (interpreting a Colorado statute).

233. 486 P.2d 151 (Cal. 1971).

> sions of those jurisdictions in which similar statutes, and statutes prohibiting the sale of alcoholic beverages to minors, have been found to have been enacted for the purpose of protecting members of the general public against injuries resulting from intoxication.[234]

In spite of the court's apparently breakthrough pronouncement that the issue "is not one of proximate cause, but rather one of duty,"[235] *Vesely* is principally cited as authority for the proposition that the consumption of the alcohol does not constitute an intervening cause as a matter of law where a third party is injured.[236] In fact, the court's key language in determining the result of the case is clearly reminiscent of *Osborne* and the Second Restatement, suggesting that the court was using normative breach reasoning.[237]

In *Koback v. Crook*,[238] alcoholic beverages had been supplied to a minor by social hosts. On appeal from a dismissal for failure to state a claim, itself a hint that the Wisconsin courts were using a duty analysis, the Supreme Court of Wisconsin held such conduct to be negligence per se. Because the defendants made contemporary no-duty arguments,[239] the court had to face arguments going to "special relationship,"[240] loss redistribution and insurance,[241] effective deterrence mechanisms,[242] and false positives.[243] As noted in the similar case of *Slade v. Smith's Management Corp.*:

> The effect of establishing negligence per se through violation of a statute is to conclusively establish the first two elements of a cause of action in negligence. Here, those elements in-

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234. *Id.* at 159 (citation omitted).

235. *Id.*

236. *See, e.g.*, Slicer v. Quigley, 189 Conn. 252, 257, 429 A.2d 855, 858 (1980); Sutter v. Hutchings, 327 S.E.2d 716, 718 (Ga. 1985); Masaichi Ono v. Applegate, 612 P.2d 533, 538 (Haw. 1980); Slade v. Smith's Management Corp., 808 P.2d 401, 410 (Idaho 1991).

237. *See also* Douglas v. Freeman, 814 P.2d 1160, 1169 (Wash. 1991) (breach of statutorily defined duty of care owed to dental patients).

238. 366 N.W.2d 857 (Wis. 1985).

239. *See also* Paskiet v. Quality State Oil Co., 476 N.W.2d 871, 875 (Wis. 1991). The *Paskiet* court noted that "where there is a completed chain of causation between negligence and damages, we may nevertheless deny recovery against a vendor as a matter of public policy," and proceeded to use duty-like language. *Id.* The classic contemporary statement on duty arguments is the *Weirum-Rowland* criteria. *See infra* text accompanying notes 250-55.

240. *Koback*, 366 N.W.2d at 861.

241. *Id.* at 861-62.

242. *Id.* at 863.

243. *Id.* (fraudulent claims).

> clude a duty to the plaintiff . . . and a breach of that duty. Thus these elements (duty and breach) are "taken away from the jury."[244]

One question that arises regarding negligence per se is whether judges decide issues presented in collapsed form differently from when they face the same issues in uncollapsed form. Note, for example, that the concurrence in *Koback* made it clear that liability would not be found in the case of a social host providing alcohol to an adult, a situation not covered by the statute.[245] This suggests that the presence of the legislatively enacted norm has a considerable effect on decision makers.

Finally, compare the same fact pattern analyzed with legal causation language. In *Ely v. Murphy*,[246] another social-host case, the court, reacting to older case law denying recovery on the basis of legal causation,[247] stated:

> In view of the legislative determination that minors are incompetent to assimilate responsibly the effects of alcohol and lack the legal capacity to do so, logic dictates that their consumption of alcohol does not, as a matter of law, constitute the intervening act necessary to break the chain of proximate causation and does not, as a matter of law, insulate one who provides alcohol to minors from liability for ensuing injury.[248]

In all three cases, the courts were dealing with the same basic fact pattern. All three decisions held that the state statute had *per se effect*. All three decisions approached the ruling in a collapsed way, in that the courts did not fully uncollapse the tort, but selected a single uncollapsed issue to deal with: in the first case, normative breach; in the second, duty; and in the third, legal cause. Of the three, *Vesely v. Sager* uses the most elusive reasoning, hiding behind "purpose of the statute" language.

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244. 808 P.2d 401, 408 (Idaho 1991) (citations and references omitted). *See also* Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508, 510-12 (Okla. 1991) (discussing inebriants cause of action in both collapsed and uncollapsed terms); *cf. id.* at 521-24 (Lavender, J., dissenting in part); *id.* at 524 (Wilson, J., dissenting); Christen v. Lee, 780 P.2d 1307 (Wash. 1989) (holding that the statute in question, an automobile statute, was designed to protect third parties against foreseeable hazards, thus defendant's stabbing plaintiff after an unrelated car accident was not foreseeable as a matter of law).

245. *Koback*, 366 N.W.2d at 866.

246. 207 Conn. 88, 540 A.2d 54 (1988).

247. *See supra* note 232.

248. 207 Conn. at 95, 540 A.2d at 58.

Given that the result in all three cases was the same, why should it matter if a court chooses one uncollapsed issue rather than another as the basis for its analysis? The answer is that when constructing arguments before the court, it is useful to know how a particular court approaches particular fact patterns in the face of per se arguments. For example, a detected tendency to use duty would lead to more abstract, or even explicitly allocational, arguments from counsel, while normative breach or legal causation reasoning would attract fact-sensitive or fact-intensive arguments, respectively.[249]

2. Duty and Risk-Assessment

California's influence on the development of modern and postmodern negligence law was based principally on the adoption of an explicit and activist approach to duty. Although many jurisdictions continue to be openly hostile to the duty concept,[250] in *Rowland v. Christian*,[251] and *Weirum v. RKO General, Inc.*,[252] the California Supreme

249. An additional reason for the analysis might exist if there is extant state authority deciding the fact pattern in an uncollapsed (i.e., not per se) manner. *See, e.g.*, Newport v. Moran, 721 P.2d 465 (Or. Ct. App. 1986). Assume, for example, that prior authority has tended to lean against recovery on this fact pattern on legal-cause grounds. It is likely that, left to its own devices, a court asked to decide a per se argument in the same fact pattern would pick on legal cause and track the non-per se decision. Therefore, it would make strategic sense for a party seeking a different result to make duty-like arguments.

250. *See, e.g.*, Fazzolari v. Portland Sch. Dist., 734 P.2d 1326 (Or. 1987); Donaca v. Curry County, 734 P.2d 1339, 1340 (Or. 1987); Kimbler v. Stillwell, 734 P.2d 1344 (Or. 1987).

251. 443 P.2d 561 (Cal. 1968). The *Rowland* court described the type of analysis used in this approach:

> A departure from this fundamental principle [of a general duty of care] involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 564.

252. 539 P.2d 36 (Cal. 1975). The *Weirum* court further refined the analysis to be used in determining the duty owed:

> The determination of duty is primarily a question of law. It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others

Court melded allocational and ostensibly operational aspects to arrive at a fresh approach to the judicial determination of duty.

These two cases constructed a general approach to duty of care that could be used to deconstruct existing pockets of doctrinal resistance. For example, the *Rowland* court used its more conceptual approach to replace the doctrine based on the type of entrant that had long dominated the law of premises liability.[253] Similarly, the *Weirum* court was able to stare down an intervening-cause argument notwithstanding that the plaintiff's injuries were the result of an automobile collision with a third party participating in the defendant's radio contest.[254]

Nevertheless, *Weirum* precipitated a partial collapse. The case came to the California Supreme Court on appeal from an order denying defendant's motion for judgment notwithstanding the verdict. In addition to the duty issue that the court correctly stated as involving foreseeability, the court was faced with the question whether there was foresight on the facts of this particular case. The court's response was uncontroversial, noting that "[w]hile duty is a question of law, foreseeability is a question of fact for the jury."[255] However, discussing "duty foreseeability" in such close proximity to "breach foreseeability" tempted collapse, a temptation indulged in by the majority of the supreme court in *Bigbee v. Pacific Telephone & Telegraph Co.*[256]

An apparently unremarkable case, *Bigbee* involved the user of a telephone booth who was injured when an automobile driven by an intoxicated driver jumped the curb and struck the booth. What brought *Bigbee* notoriety[257] and the attention of the California Supreme Court

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from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty.

Id. at 39 (citations and footnote omitted).

253. 443 P.2d at 564-68.

254. It avoided this argument in foreseeability terms:

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

539 P.2d at 40 (citations omitted).

255. *Id.* at 39 (citation omitted).

256. 665 P.2d 947 (Cal. 1983).

257. Bigbee settled his claim with the telephone company only to find his victory criticized in

was that the plaintiff brought his action against the companies allegedly responsible for the design, location, installation, and maintenance of the telephone booth.

The trial court granted defendants' motion to dismiss. The resultant appeal to the California Supreme Court exposed the potential for collapsing California's complex duty determinant. For the majority, Chief Justice Bird seized upon the statement in *Weirum* that "foreseeability is a question of fact for the jury."[258] For the Chief Justice, therefore, "[t]urning to the merits of this case, the question presented is a relatively simple one. Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances . . . ?"[259]

Of course, for the majority in *Bigbee*, constructive foresight was not an issue. After all, there were declarations on the record that a similar accident had occurred at this location, and that the defendants had reacted by erecting steel bumper posts. Unsurprisingly, the court concluded:

> Indeed, in light of the circumstances of modern life, it seems evident that a jury could reasonably find that defendants should have foreseen the possibility of the very accident which actually occurred here. Swift traffic on a major thoroughfare late at night is to be expected. Regrettably, so too are intoxicated drivers. Moreover, it is not uncommon for speeding and/or intoxicated drivers to lose control of their cars and crash into poles, buildings or whatever else may be standing alongside the road they travel—no matter how straight and level that road may be.
>
> Where a telephone booth, which is difficult to exit, is placed 15 feet from such a thoroughfare, the risk that it might be struck by a car veering off the street, thereby causing injury to a person trapped within, cannot be said to be unforeseeable as a matter of law.[260]

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a May 1986 speech by President Ronald Reagan as an example of the problems with the torts system. Leon Daniel, *Witnesses Hit Insurers' Claims About Damage Awards*, UPI, July 24, 1986, *available in* LEXIS, Nexis Library, UPI File.

258. The Chief Justice prefaced her statement with the qualifier "ordinarily." 665 P.2d at 950.

259. *Id.* at 951.

260. *Id.* at 952 (citation omitted).

Obviously, the flaw here was in the court's incorrect characterization of the issue. As understood in *Rowland* and *Weirum*, a "duty" analysis of *Bigbee* would focus on the abstract determination of whether redistribution should be permitted in this fact pattern. In contrast, *Bigbee* indulged in a fact-specific inquiry whether *this particular defendant* had been at fault given that it had actually foreseen the injury-producing event. In choosing the latter approach, the *Bigbee* majority collapsed an abstract duty issue into an individual risk-assessment determination.

This misstep was seized upon by the minority in *Bigbee*.[261] For Justice Kroninger, the issue clearly was one of duty, and an issue governed by the *Rowland-Weirum* criteria. In other words "foreseeability is but one of many considerations in weighing the question of whether a duty should be found to exist. . . . [T]here are many situations involving foreseeable risks where there is no duty. Foreseeability does not establish duty; it merely defines its limits."[262]

When he applied the *Rowland-Weirum* factors to the pleadings regarding the negligent location allegation, Justice Kroninger concluded:

> Risk of harm from third persons is similarly inherent and foreseeable in pedestrian activities in proximity to vehicular traffic. By themselves, however, those risks are not deemed unreasonable and accordingly, without more, as a matter of law no one should be said to be under a duty of care to protect others from them, particularly where, as here, there is no reason to believe that the party sought to be charged was in a superior position to foresee the risk of harm.
>
> The location of the telephone booth here, 15 feet from the curb, beside a straight and level roadway, and adjacent to a building, provided, if anything, more protection from the risk of curb-jumping automobiles than the adjacent sidewalk itself. To hold that defendants could be found liable for locating the booth where they did is tantamount to holding that one may be found negligent whenever he conducts everyday activities on or adjacent to the public sidewalk. It will go far toward making all roadside businesses insurers of safety from wayward travelers.

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261. Justice Kroninger dissented with regard to the plaintiff's location argument, but concurred with regard to his defective maintenance allegation. *Id.* at 955-56 (Kroninger, J., concurring in part and dissenting in part).

262. *Id.* at 955 (citation omitted).

> There is no suggestion of anything defendants might reasonably have done differently with respect to siting except simply not to maintain a telephone booth in the vicinity at all. Public telephones have, in fact, long been maintained adjacent to streets and highways for the convenience of the public, despite the obvious but remote risks. . . . Balancing the gravity and likelihood of danger against the usefulness of conveniently located public telephones, and applying each of the other "considerations" enumerated in *Rowland*, I would opt for encouraging their continued maintenance adjacent to streets and highways, and would hold that on the present facts there arose no duty which could impose liability based on location of the booth.[263]

Bigbee suggested a serious split from *Rowland* and *Weirum*. The factors developed in those earlier cases were uncollapsed from a hidden world of duty-proximate analysis, and designed to facilitate *increasing* loss redistribution.[264] Given the opinions in *Bigbee*, it appears there was a growing sentiment that the openly discussed and presumably briefed *Rowland-Weirum* factors provided too many opportunities for defense arguments designed to trigger motions to dismiss. In reaction, the *Bigbee* majority favored a horizontal collapse, collapsing duty into risk-assessment. Such a fact-intensifying approach guarantees a reduction in cases being decided on an abstract, "failure to state" basis.[265]

It was not until *Ballard v. Uribe*[266] that California's highest court

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263. *Id.* at 955-56 (footnote and cross-references omitted). Compare the majority's view of the application of the *Weirum-Rowland* factors:

> In terms of the various factors suggested by *Rowland v. Christian* it is undisputed that plaintiff suffered serious injury. An affirmative finding on foreseeability by the jury would obviously establish not only "the foreseeability of harm to plaintiff" but also a sufficiently "close[] connection between the defendant[s'] conduct and the injury suffered." As to the remaining factors, although defendants' conduct may have been without "moral blame," imposition of liability would further the policy of "preventing future harm." Finally, imposition of liability would not be unduly burdensome to defendants given the probable availability of insurance for these types of accidents which defendants themselves maintain do not recur with great frequency.
>
> This is not to say, of course, that defendants are liable for plaintiff's injury. This court decides only that this question is one that should be reserved for a jury.

Id. at 953 n.14 (alteration in original) (citation omitted). For an even more explicit application of the *Weirum-Rowland* factors, see Hegyes v. Unjian Enters., 286 Cal. Rptr. 85, 110-17 (Ct. App. 1991) (Johnson, J., dissenting).

264. *See supra* text accompanying notes 251-55.

265. *See* FED. R. CIV. P. 12(b)(6).

266. 715 P.2d 624 (Cal. 1986).

once again proclaimed an uncollapsed duty:

> [T]he "foreseeability" concept plays a variety of roles in tort doctrine generally; in some contexts it is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of "duty."
>
> The question of "duty" is decided by the court, not the jury. . . . The foreseeability of a particular kind of harm plays a very significant role in [the duty] calculus, but a court's task—in determining "duty"—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.
>
> The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.[267]

Ballard makes an important contribution to the maintenance of an uncollapsed tort of negligence, by making a clear distinction between the role of foreseeability in the court's abstract duty analysis and its role in the jury's determination of risk-assessment.[268] In fact *Ballard*

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267. *Id.* at 628-29 n.6 (citations omitted).

268. This distinction was described in *Ballard* as "whether a *particular plaintiff's injury* was reasonably foreseeable in light of a *particular defendant's conduct.*" *Id.* at 628 n.6 (emphasis added). *See also* Lopez v. McDonald's, 238 Cal. Rptr. 436 (Ct. App. 1987), where the court stated:

> Although the breadth of "duty" is decided by the court as a question of law dependent upon a variety of relevant factors including foreseeability of the risk of harm as the principal consideration, it is often misleadingly stated that although duty is a question of law, foreseeability is a question of fact which must be decided by the trier of fact in any case about which reasonable minds can differ. To the contrary, where it is one factor to which a court looks in defining the boundaries of "duty", foreseeability of the particular kind of harm is strictly a question of law when evaluated within the general context of "whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." However, foreseeability is a question of fact, which must be decided by a trier of

lacks only in the omission of two subtleties.

First, if fact-intensive foreseeability is part of risk-assessment but not duty, what exactly is being examined by the court at the duty stage, *sub nomine* "foreseeability"? After all, the natural meanings of foreseeability are factual. Thus, it must be concluded that the foreseeability inquiry in the duty context must be more normative; i.e., in the sense of the normative question whether members of this defendant-class *should* contemplate this general type of risk.[269] At the very least, it may be suggested that courts committing to an uncollapsed duty inquiry, but continuing to place an over-emphasis on an apparently empirical foreseeability inquiry, *as part of the duty analysis*, are flirting with the danger of collapse.[270]

The second omission from the *Ballard* formulation has been a source of considerable confusion; indeed, it is probably the explanation for the doctrinal misstep in *Bigbee*, if not that court's allocational motive. The troublesome, over-generalizing statement that "foreseeability is a question of fact for the jury" may be successfully declawed by following *Ballard* and resisting any duty/risk-assessment collapse. The trick is to realize that sometimes the risk-assessment foreseeability is for the court as a matter of law. As with any essentially factual inquiry, there will be times when the court should and will take the issue from the hands of the jury.[271] Error creeps in when this is viewed as somehow changing the essence of the inquiry, rather than noncontroversial jury control.[272] In sum, the fact that the foreseeability element of risk-assessment is usually a matter of fact, but may in a clear case be a matter of law, does not justify a spurious corollary that while the foreseeability aspect of duty is a matter of law, in a close case it may be a matter of fact for the jury.[273]

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fact, in any case about which reasonable minds can differ within the more focused, fact-specific settings of breach of duty and causation.

Id. at 443 n.6 (quoting Ballard v. Uribe, 715 P.2d 624, 628 n.6 (Cal. 1986)) (citations omitted).

269. *See, e.g.*, Sally G. v. Orange Glen Estates Homeowners, 227 Cal. Rptr. 559, 563 (Ct. App. 1986) ("Accordingly, within a general context here, it is imminently foreseeable the condition of the property (the clubhouse) may contribute to or facilitate the wrongful acts of third persons, resulting in the kind of harm [plaintiffs] suffered.").

270. *See, e.g.*, Hegyes v. Unjian Enters., 286 Cal. Rptr. 85, 102 (Ct. App. 1991).

271. *See, e.g.*, King v. United States, 756 F. Supp. 1357, 1360 (E.D. Cal. 1990); Weissich v. County of Marin, 274 Cal. Rptr. 342 (Ct. App. 1990) (proximate causation decided as a matter of law).

272. *See generally Lopez*, 238 Cal. Rptr. 436.

273. *Cf.* Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981), *aff'd*, 706 F.2d 1027 (9th Cir.), *cert. denied*, 464 U.S. 938 (1983). "It is well-settled that the existence of 'duty' is a ques-

V. CONCLUSION: MOTIVATING COLLAPSE

Beyond appreciating the collapse phenomenon as a judicial technique, at least two questions remain. First, to what extent do our judicial decision makers consciously use collapse, and second, can we detect any broad patterns motivating collapse or particular forms of collapse?

At one level, collapse may be dismissed as no more than an exercise in doctrinal simplification, as an opportunity to cull redundant operational rules, rather than as a component of a broader stratagem. Such an interpretation might be argued for, say, the collapse of legal cause into risk-assessment. In the literature, that famous collapse frequently is referred to as the "within the risk" approach to legal cause.[274] Yet, a more intellectually exciting motivation might exist in that the within-the-risk collapsed approach appeals to those who value proportionality and lowered administrative costs.[275] Similarly, courts are not above using collapse as part of a broader strategy.[276]

However, the most prevalent judicial motives underlying collapse and uncollapse are allocational; those motives receive their operational effect through the variable of jury control. It is with regard to that variable that a real allocational distinction between vertical and horizontal collapse should be noted.

In general terms, vertically collapsed torts such as ultrahazardous activity tend to concentrate decisional power in the allocation

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tion of law. As is often stated, duty is 'only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Id.* (citations omitted). The court supported that statement with a footnote: "Although foreseeability of risk, which is of primary importance in this case, is usually a question of fact, it becomes a question of law where reasonable minds cannot differ." *Id.* at 29 n.1.

274. Possibly the most famous justification for this collapse was put forward by Viscount Simonds in *The Wagon Mound No. 1*:

> [I]t does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng. Co. (*The Wagon Mound*), 1961 App. Cas. 388, 422-23 (P.C.). *The Wagon Mound* rejected the heretofore dominant *Polemis* rule. *In re* Polemis, 3 K.B. 560, 572 (1921 C.A.) (per Bankes, L.J., "Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant.").

275. *See generally* William L. Prosser, *Palsgraf Revisited*, 52 MICH L REV 1, 17 (1953).

276. Recall the analysis of the *Beshada* case. *See supra* text accompanying notes 197-211.

model—an issue typically reserved for the judge.[277] As a technique, therefore, vertical collapse will tend to surface in areas where the courts want to exercise tight control of the doctrine. Such has been the case with the *Rylands v. Fletcher* and ultrahazardous activity torts that have been successfully, albeit quietly,[278] restricted to fact patterns involving landowners. Caution also is displayed when courts experiment with new allocation models, such as "stricter" product liability. Although caution is justified during the developmental stage, the opaqueness of a vertically collapsed tort renders comprehension and critique difficult.

In contrast, horizontal collapse usually connotes an absence of judicial circumspection. Courts that horizontally collapse doctrinal structures do so to decrease the amount of jury control, thereby increasing net risk-redistribution. For example, the partially collapsed *Bigbee* majority will tend to produce more plaintiff victories than the uncollapsed *Bigbee* minority.[279]

Although just one judicial technique among many, and clearly sharing space on a conceptual continuum with the approaches of analogizing and moving from general rules to exceptions, doctrinal collapse is a more extreme technique than the doctrinal simplification it often seems to resemble. As a technique that is gaining in judicial popularity, collapse, particularly where it signifies abrogation of jury control in favor of unbridled and unexplained risk-redistribution, may be more than a technique of reasoning—it also indicates a predetermined allocational conclusion.

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277. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-520 cmt. l (1977) (specific in keeping the characterization in the hands of the judge); Matomco Oil Co. v. Arctic Mechanical, Inc., 796 P.2d 1336, 1341-42 (Alaska 1990) (submitting ultrahazardousness issue to jury constituted reversible error).

278. *Cf.* Strickland v. Fowler, 499 So. 2d 199, 201 (La. Ct. App. 1986) (holding that "[t]he marketing of handguns to the general public falls far beyond the boundaries of the Louisiana doctrine of ultrahazardous activities. *It is not an activity related to land or other immovables* . . . .") (emphasis added).

279. *See supra* text accompanying notes 256-65.